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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRAD RAFFENSPERGER, ET AL.,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF BENCH TRIAL - VOLUME 10A PROCEEDINGS  
BEFORE THE HONORABLE AMY TOTENBERG  
UNITED STATES DISTRICT SENIOR JUDGE  
JANUARY 23, 2024

***MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED***

***TRANSCRIPT PRODUCED BY:***

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UNITED STATES DISTRICT COURT  
OFFICIAL CERTIFIED TRANSCRIPT

A P P E A R A N C E S O F C O U N S E L

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**P R O C E E D I N G S**

**(Atlanta, Fulton County, Georgia; January 23, 2024.)**

THE COURT: I think you threw too many things at us yesterday. So we were still looking at them.

All right. So were we at the issue of your offering the depositions? Is that what you want to do at this juncture?

MR. CROSS: I think we were planning to play the rest of the videos. We have cut them back a bit. It is a little over 40 minutes.

THE COURT: All right. That's fine.

MR. CROSS: There are a couple of quick preliminary matters if we could, Your Honor. One is, Your Honor might recall at the start of the trial the State asked that the parties agree to disclose witnesses two business days in advance instead of one. We agreed to that. Although they had objected to that in December.

They also asked us at the start of the trial to disclose our witnesses in the order in which we plan to call them. We have done that every day. We've often erred on the side of providing witnesses two to three days out.

Your Honor directed them to provide their witnesses over the weekend. We did get witnesses. But the list we got last night had two new witnesses that had not been disclosed. They dropped one. And they refuse to tell us the order in which they will call them, other than to say they start the day

1 with Mr. Germany.

2 We're just asking for a directive since we thought we  
3 had an agreement that we will get witnesses at least two  
4 business days in advance and we will get them in the order in  
5 which they plan to call them, as we did.

6 MR. TYSON: Your Honor, we did provide the list as  
7 required last night at 6:00 P.M. We went back and looked after  
8 we got Mr. Cross' email about order.

9 From our count, I think only three of the seven or  
10 eight days we have been in trial did the plaintiffs proceed in  
11 the order they provided the list to us the night before.

12 And so from our perspective, we're happy to do that  
13 if we need to. We obviously have some things moving around.  
14 Mr. Hamilton, for example, was going to go -- we had to move  
15 some things with that. It happens in trial.

16 We provided, just as they did for us, we're going to  
17 start with Mr. Germany. We'll keep things posted. They have  
18 the menu of what we're going to look at today. But we'll do  
19 whatever the Court -- we're trying to make this work in as fair  
20 a way as possible given that we also had a bunch of witnesses  
21 sitting here when they did not go in the order they had given  
22 to us the night before. So --

23 THE COURT: Well, as you can well imagine, it is not  
24 something I really can parse as to what happened. I think that  
25 you should do the best you can to give them in the order,

1 understanding that things happen and people's schedules go  
2 upside down. And then advise as soon as you can if the  
3 schedule is having to change.

4 I mean, that's all I can really say. I mean, things  
5 will run more smoothly, obviously, if that happens.

6 And I understood parenthetically on Saturday that it  
7 was a possibility you wouldn't -- we wouldn't reach any  
8 defendants' witnesses on Monday. But the spirit of the whole  
9 thing was to get it done.

10 And also it was a weekend. And, therefore, it was  
11 the obvious time that plaintiffs' counsel would need -- want to  
12 take advantage of an order to prepare so that things could run  
13 more smoothly. And you had two long weekends -- three-day  
14 weekends, in fact, to do that. So it just sort of -- you know,  
15 I'm just trying to get you all obviously to have as much time  
16 as you can under very crunched circumstances.

17 MR. TYSON: Certainly, Your Honor. We appreciate  
18 that. We'll continue to follow that.

19 I did just want to clarify. One of the challenges  
20 for us the first day of trial was the list we received before  
21 the weekend before trial changed significantly by that Monday  
22 night email the day before trial.

23 So again, we're all trying to work the best we can,  
24 but we'll proceed accordingly.

25 THE COURT: All right. Well, thank you. And



1 inevitably people are juggling a lot of balls, including the  
2 Court, so there are things that happen. That's all.

3 I understood there was some issue -- I mean, I know  
4 that we're going to deal with your proffer when you're through  
5 with these witnesses, and we'll discuss that at some -- and  
6 that will take a little while.

7 I understand that Mr. Oles made a motion to call  
8 somebody from the Coalition. And I don't really understand  
9 what is going on. So I'm going to just try to address that as  
10 well while we're trying to sort some things out.

11 MR. OLES: I can address that, Judge.

12 Judge, we are not making a motion to call anyone from  
13 the Coalition. If there was any error -- we had simply filed a  
14 motion asking for my client to be able to bring in his laptop  
15 while he is here so that he can keep his job.

16 THE COURT: I thought there was somebody else --

17 MR. OLES: Because everyone -- it is so important for  
18 him to be here, that way we would be able to --

19 THE COURT: Excuse me just a second.

20 There's some confusion about what you're asking for  
21 because there was a reference to somebody -- maybe you copied  
22 something in it and it ended up being incorrect.

23 Ms. Greenhalgh, is that --

24 MR. MCGUIRE: Ms. Greenhalgh.

25 THE COURT: Ms. Greenhalgh. Is this relating to

1 Ms. Greenhalgh or not? Because it is what we thought related  
2 to Ms. Greenhalgh.

3 MR. OLES: We're certainly not -- my client is not  
4 interested in Ms. Greenhalgh. I believe what Mr. Cross brought  
5 to my attention this morning was that my assistant may have  
6 attached the wrong document.

7 THE COURT: Okay. That's what we got.

8 MR. OLES: She filed a motion requesting Mr. Davis --

9 THE COURT: That is the confusion on my part. We've  
10 got a lot of --

11 MR. OLES: Thank you. I apologize for that, Judge.

12 THE COURT: Talking about moving parts. All right.

13 So you're asking instead not for Ms. Greenhalgh but  
14 for your client to bring in what?

15 MR. OLES: He would like to bring his phone and his  
16 laptop so that he can continue to work while he is attending.

17 THE COURT: But he wants to work for his job at this  
18 point? Is that what you are saying while he is --

19 MR. OLES: That is what he would like to do. He  
20 would like to maintain a presence here. But if he can go out  
21 and work, then he can try and do both.

22 THE COURT: Does anyone else have any position as to  
23 that?

24 MR. CROSS: Your Honor, we do have a concern, and I  
25 addressed it with Mr. Oles this morning, about how the

1 electronic equipment might be used. And what has unfolded in  
2 the last day that has us concerned is, one of the points we've  
3 made is that the case Mr. Davis is advancing is not only within  
4 the --

5 THE COURT: Wait a second.

6 Do you need --

7 COURTROOM DEPUTY CLERK: We're good.

8 MR. CROSS: The case he's advancing, it is not within  
9 the scope of the claims here. But it is directly at odds.

10 Let me just play something real quick for the Court  
11 so you can understand where the concern is coming from.

12 **(Playing of the videotape.)**

13 THE COURT: Can you -- what is it that you're going  
14 to play, first of all?

15 MR. CROSS: So this is an interview that Garland  
16 Favorito, Mr. Oles' litigation consultant, gave with Mike  
17 Lindell yesterday. And what he says is, is what we long  
18 suspected, he admits that what they are after in this case is  
19 relief to eliminate scanners.

20 And he acknowledges that that is at odds with the  
21 other plaintiffs. He acknowledges that they are trying to put  
22 in evidence like evidence of scanners counting ballots twice to  
23 do that. And what they want to do is eliminate, his words, the  
24 entire existing voting system.

25 And so it is not just -- the two points are, one, the

1 Court has no authority to do that because it is not within the  
2 scope of the claims.

3 And two, it is directly at odds with the relief we're  
4 seeking and the fundamental position we have taken in this case  
5 that scanners are the right way to do it.

6 And so, you know, respectfully to Mr. Oles, we have  
7 been told time and time again, including Your Honor, that they  
8 are only pursuing the relief in the case. His litigation  
9 consultant has now acknowledged that is not happening. And we  
10 have wasted a lot of time pursuing this.

11 And now we have a concern, given the lack of candor  
12 about what is really happening, about bringing in electronic  
13 equipment and how that might be used.

14 MR. OLES: Well, Judge, I don't think that has  
15 anything to do with my request before the Court, which is  
16 simply that Mr. Ricardo Davis be allowed to bring his phone in  
17 and his laptop so that he can continue to work while he is  
18 attending, because counsel has repeatedly pointed out that my  
19 client is not here. And it is only as a result of counsel's  
20 repeated insistence that my client be physically present that  
21 he is making this request.

22 THE COURT: All right. Let me just say, first of  
23 all, as to your client's presence, it is up -- the two of you  
24 can decide. My concern, I wanted to articulate, was simply  
25 that especially when you are examining somebody that is

1 relating to your client's interests, if you're relying solely  
2 on your consultant and not on your client, it gives -- it is  
3 not -- we're not in a criminal proceeding. So it is not like  
4 you've abandoned your client or he has not been present when he  
5 needed to be in a criminal proceeding.

6 But there is an interest in your representing  
7 obviously the person who has been a party in this case and was  
8 deposed for years.

9 It is not a mandate if he has to be -- you know, he  
10 has work obligations, he can be outside the courtroom. But it  
11 was -- there were days on end that he was not present and that  
12 you were looking -- it looked to me also as if you were looking  
13 to Mr. Favorito for -- and it was only after I asked you about  
14 it that you indicated he was your consultant.

15 And that is -- that was my concern. Because if on  
16 one hand your client has indicated he wanted new counsel  
17 because he was -- had some disagreements with his Coalition  
18 counsel, and there was -- as to the claims or the way  
19 everything was being pursued that was very late in being  
20 advanced on his part, but in November -- late November, then,  
21 you know, the natural thought was on my part, well, then he  
22 would want to be here with you.

23 MR. OLES: Yes. Understood.

24 THE COURT: So that was really my concern rather than  
25 have somebody else, a third person, even if he is close with

1 Mr. Favorito, guiding the case. That was of concern.

2 You know, we have -- I have some concerns about a  
3 whole other laptop coming in under the circumstances here.  
4 But -- and I don't want to have to monitor obviously that your  
5 client is doing his work rather than reporting on something  
6 else.

7 And maybe a better compromise is he brings in -- and  
8 I don't know really the nature of what he has to do every day.  
9 If he wants -- perhaps if he is here some days and not others,  
10 that would be better as a compromise. I can't mandate that he  
11 be present but -- under the circumstances, but I don't -- it  
12 just is not proper, it seems to me, for him to bring -- to be  
13 part of a case of this magnitude and not at least listen in  
14 some of the time. So that is the circumstances.

15 And if I see, instead, that he's, you know, doing any  
16 type of social media instead and communicating about the case  
17 in that way, that would be a concern. I don't -- because that  
18 would be -- I mean, I have expressed this before to everybody.

19 So he is -- is Mr. Davis here now? I don't see him,  
20 but ...

21 MR. OLES: I do know it is -- he had -- he was  
22 dropping off his wife at work this morning. And he is on the  
23 State's called witness list today. So he must be available for  
24 that.

25 THE COURT: Why don't we wait on this until we can --

1 until he is here personally.

2 MR. TYSON: And, Your Honor, just to be clear, from  
3 the State's perspective, we don't have any objection to  
4 Mr. Davis bringing his laptop and phone in. Ms. Marks  
5 obviously has had her equipment. I think everybody has. So we  
6 don't have any objection.

7 THE COURT: And I understand that. But I haven't  
8 had -- I have had ongoing communications obviously with  
9 everyone who is in this room, including Ms. Marks, not  
10 separately but -- and she has counsel who is working with her  
11 as well. So I have got that.

12 But Mr. Davis, his participation in the case more  
13 recently has been uneven and so -- and I don't know, you  
14 know -- and I have never talked about to him -- which I have  
15 Ms. Marks and in other proceedings, about what the proper scope  
16 of her -- her role when you're in the court.

17 So I would like to do that and then find out a little  
18 more from him. And then we can proceed to address that.

19 MR. OLES: And we are certainly -- I'm certainly more  
20 than happy to produce him, Judge. But as I must say this, as I  
21 look around the courtroom, I see no one here to represent  
22 Secretary Raffensperger or any member of the board, unless they  
23 were subpoenaed in. I see no one -- I see some of the Curling  
24 and Coalition Plaintiffs. But certainly not all of them.

25 And no one in this courtroom has suggested that there

1 is anything wrong with them not all being here for the whole  
2 time of this case. And I appreciate what the Court is  
3 expressing, and my client is sincere about his interest in the  
4 case. Otherwise he wouldn't have gotten me coming in at the  
5 last second in a high profile case on this 23rd floor of this  
6 building before Your Honor right before your retirement and  
7 placing my career at risk and my reputation in order to do  
8 this, which is only to say --

9 THE COURT: I'm not retiring. I mean, maybe there  
10 are people here who would like me to retire, but I'm not  
11 retiring. I just want to be -- assure you --

12 MR. OLES: Maybe I'm --

13 THE COURT: -- my father gave his last concert when  
14 he was 95. He died 101. There were students all around him  
15 all the way to the end. So, unfortunately, I have been --  
16 fortunately from a health perspective and a life perspective  
17 I've -- I have been blessed by his presence in my life.

18 But, unfortunately, he seems to have told me, stay  
19 young by being engaged. So ...

20 MR. OLES: Well, I personally hope that Your Honor  
21 will be here for a long time.

22 But I feel hounded by Mr. Cross and persecuted by  
23 Mr. Cross.

24 THE COURT: All right. Mr. Cross --

25 MR. OLES: I believe it is unfair.



1 THE COURT: Mr. Cross, don't persecute counsel. All  
2 right?

3 I mean, I understand this is upsetting. What has  
4 happened is still upsetting. And I have to say almost all the  
5 other plaintiffs have been, in fact, here on a day in, day out  
6 basis. It is not -- I am not taking attendance.

7 It was the circumstances of having required a new --  
8 injecting a new lawyer who wants to do different things not  
9 necessarily on the pretrial order and his not being here and  
10 the reliance on Mr. Favorito in this context. I mean, that is  
11 the bottom line why -- their concerns and some of mine.

12 So, anyway, he is going to come here and we're going  
13 to discuss with him what he needs. I don't have any problem  
14 with his having a computer or a cell phone. I just want to  
15 make sure he understands basically the parameters of use inside  
16 the courthouse.

17 MR. OLES: All right.

18 THE COURT: And I don't think -- well, I know you do  
19 a range of work. You're not in the federal court routinely.  
20 And so -- and this place is a very picky place about the use of  
21 technology --

22 MR. OLES: I understand.

23 THE COURT: -- inside the court. So it is important  
24 that I communicate that to him.

25 As to lindellplan.com, we'll deal with that later to

1 the extent that it's relevant.

2 MR. OLES: At the risk of provoking further uproar in  
3 the Court, before the plaintiffs close their case, my client  
4 has asked me to proceed with the proffers that we suggested  
5 that we would do earlier as each of these issues have come up.

6 And I would like the opportunity to place on the  
7 record three proffers of evidence that --

8 THE COURT: How long is this? Or is it something  
9 that we should do --

10 MR. OLES: Five, ten minutes. It is going to be  
11 short.

12 THE COURT: All right. Well, why don't we hear -- go  
13 ahead with the -- unless somebody else among the group thinks  
14 it is better just simply to have the proffers. But I was  
15 thinking we should just go ahead with the videotape at this  
16 point, and then you can do the proffers.

17 MR. OLES: Thank you, Judge.

18 THE COURT: And I want to say, Mr. Oles, also that I  
19 do appreciate your entire manner has been completely  
20 professional and courteous, and I very much appreciate that  
21 given the tension around the circumstances in this case and all  
22 of the things that people also experience during litigation of  
23 a large case, which makes people exhausted and lose their cool  
24 at times.

25 MR. OLES: Thank you, Judge. I appreciate that.

1 MR. CROSS: Your Honor, if I could, I would just echo  
2 that. I'm sorry Mr. Oles feels persecuted. Our issue is not  
3 with Mr. Oles. He's doing his job. Our issue is what we will  
4 get to eventually about the --

5 THE COURT: Well, you can tell me later on. Let's  
6 hold that off. I don't need to hear it twice. I'll hear it  
7 I'm sure very eloquently presented, your concern, later on.

8 MR. CROSS: Your Honor, could we ask what the witness  
9 order is for today?

10 MR. TYSON: Your Honor, Mr. Germany and then our plan  
11 is to go to Mr. Evans if there is time.

12 THE COURT: Okay. Remind me who Mr. Evans is.

13 MR. TYSON: Mr. Evans took Mr. Harvey's place as the  
14 elections director for the Secretary.

15 THE COURT: Okay.

16 I mean, Mr. Harvey is, of course, somebody I've known  
17 for years either through this case and otherwise. So I was  
18 forgetting that -- I didn't forget he left. I just forgot  
19 Mr. Evans' name in the process.

20 Okay. All right. Is there anything else that we  
21 need to deal with?

22 **THE PLAINTIFFS' CASE (Continued).**

23 MR. SCHEINMAN: Then, Your Honor, at this time the  
24 plaintiffs intend to continue with the videos we were  
25 presenting yesterday.

1           At this time we would like to show you an excerpt  
2           from the deposition of Cathy Latham. This was taken on  
3           August 8th of 2022. And the attorneys you will hear are David  
4           Cross for the plaintiffs and Mr. Pico-Prats for the defendants.  
5           This is Tab 6 in the binder we gave you yesterday, if  
6           you would like to follow along.

7                               **(The videotaped deposition clip of CATHY LATHAM**  
8                               **was played.)**

9           MR. SCHEINMAN: Thank you, Your Honor.

10           And one quick correction, there was a third attorney  
11           voice in the middle. That was Russell Abney on behalf of the  
12           Coalition for Good Governance.

13           THE COURT: You're going to have to speak up.

14           MR. SCHEINMAN: All right. There was a third  
15           attorney voice I didn't mention in the middle of that passage.  
16           That was Russell Abney on behalf of the Coalition for Good  
17           Governance, just so the record is clear, Your Honor.

18           THE COURT: Which one of these entries?

19           MR. SCHEINMAN: That is the entry on page -- it is 5  
20           and 6 from Lines 203, is where Mr. Abney's examination began,  
21           and then Mr. Pico-Prats took over from everything after marked  
22           line -- after Page, forgive me, 207.

23           THE COURT: There is nothing with 207 here.

24           MR. SCHEINMAN: I was referring to the line markings  
25           from -- the page markings, forgive me, from the original

1 deposition that are next to the passages.

2 THE COURT: This jumps from 205 to 206 and then from  
3 206.09 to 208.06.

4 MR. SCHEINMAN: Right. So the numbers with 208 are  
5 also Mr. Prats. His examination began on 207 of the original  
6 transcript.

7 THE COURT: You're going to just have to come up  
8 here. I can't get down what you are saying.

9 MR. SCHEINMAN: I was simply trying to correct, Your  
10 Honor, that Mr. Prats' examination began on Page 207 of the  
11 original transcript, and so anything with a page number higher  
12 than that was him. And everything from Page 198 to 206 was  
13 Russell Abney on behalf of the Coalition.

14 THE COURT: All right. But I don't have those here,  
15 but can I look at them --

16 MR. SCHEINMAN: Yes. I --

17 THE COURT: You're not proffering -- just to go back.  
18 The materials in this that you have provided me as a highlight,  
19 these are not the full extent of your proffer?

20 MR. SCHEINMAN: Correct. Those will be --

21 THE COURT: And there are other pages that are  
22 contained in the proffer?

23 MR. SCHEINMAN: Yes, Your Honor.

24 THE COURT: All right. I guess this ended up being  
25 more confusing than I thought.

1 MR. SCHEINMAN: I apologize. I just --

2 THE COURT: That's fine.

3 MR. SCHEINMAN: I did not want to leave that out.

4 So up next we're going to play selections from the  
5 deposition of Doug Logan. This was taken on November 18, 2022.  
6 And you'll hear from Bruce Brown on behalf of the plaintiffs.

7 **(The videotaped deposition clip of DOUG LOGAN**  
8 **was played.)**

9 MR. SCHEINMAN: Your Honor, up next plaintiffs intend  
10 to introduce the -- selections from the deposition of Jeffrey  
11 Lenberg. This was taken on November 21st, 2022. And you'll  
12 hear from Bruce Brown again and Caroline Middleton on behalf of  
13 the Curling Plaintiffs.

14 THE COURT: Thank you.

15 MR. SCHEINMAN: It is Tab 7 in your binder.

16 **(The videotaped deposition clip of JEFFREY**  
17 **LENBERG was played.)**

18 MR. SCHEINMAN: Your Honor, up next plaintiffs offer  
19 a selection from the deposition of Wendell Stone. Mr. Stone  
20 was the 30(b)(6) representative for the Coffee County Board of  
21 Elections & Registration. This deposition was on  
22 September 1st, 2022. And you'll hear from David Cross. It is  
23 Tab 9 in the binder.

24 **(The videotaped deposition clip of WENDELL**  
25 **STONE was played.)**

1 MR. SCHEINMAN: Your Honor, up next we would like to  
2 present a selection from the deposition of James Barnes. This  
3 deposition was taken on July 20th, 2022. You'll hear from  
4 David Cross. This is the last clip you'll hear from me.

5 Thank you.

6 THE COURT: What is the tab? I'm sorry.

7 MR. SCHEINMAN: It is Tab 1, Your Honor. Tab 1.

8 THE COURT: Thank you.

9 **(The videotaped deposition clip of JAMES BARNES**  
10 **was played.)**

11 MR. CROSS: That's all the video, Your Honor. I  
12 think the next thing is the depositions.

13 MR. CAMPBELL: Yeah. So, Your Honor, at this time we  
14 would like to offer the Court the list which reflects the  
15 designations, the counters, the objections, and the exhibits  
16 that we are intending to offer through the designations.

17 I can grab it.

18 May I approach?

19 THE COURT: Yes.

20 MR. CAMPBELL: And so we are offering the transcripts  
21 which we just handed which reflect the designations and  
22 counters, and we also have video files in one of the sleeves on  
23 the binder.

24 And these are for James Barnes, Eric Chaney, Ben  
25 Cotton, Alex Cruce, Misty Hampton, Cathy Latham, Doug Logan,

1 Jeffrey Lenberg, Wendell Stone, Janice Johnston, Dean  
2 Felicetti, Michael Shamos, Gabriel Sterling, Merritt Beaver,  
3 David Hamilton, and Juan Gilbert.

4 And then we are also offering the following exhibits,  
5 which are not in dispute -- and if it is easier to follow  
6 along, I have a list printed out of the exhibits, if that would  
7 be easier for you.

8 THE COURT: Yes.

9 Why don't you just introduce the list rather than  
10 reading them all aloud. That will be easy to follow.

11 MR. CAMPBELL: So at this time we would like to  
12 introduce that list of exhibits, which we have reached an  
13 agreement with defense counsel on.

14 THE COURT: Do you want to give it a number, the  
15 list, so we can find it?

16 MR. CAMPBELL: 604.

17 THE COURT: 604?

18 MR. CAMPBELL: Yes. Thank you so much.

19 MR. MARTINO-WEINHARDT: Thank you, Your Honor.

20 I'm Matthaeus Martino-Weinhardt again for Curling  
21 plaintiffs. There are about ten exhibits where the parties  
22 have not reached agreement that plaintiffs would like to offer  
23 through the deposition designations. I think this should be  
24 relatively brief.

25 But if we may be heard on those ten exhibits, I can



1 go through them.

2 THE COURT: Do I have a list of those?

3 MR. MARTINO-WEINHARDT: You do not. But I'm going to  
4 go through them one by one, and I can provide a list  
5 afterwards.

6 THE COURT: All right.

7 MR. MARTINO-WEINHARDT: I understand that defendants  
8 are going to make their objections to each one, and they vary.

9 So the first one would be Curling --

10 THE COURT: Just one second.

11 Were there any objections relative to the deposition  
12 submissions?

13 MR. BEDARD: Yes, Your Honor. I think that they are  
14 included in that list though. As we mentioned yesterday I  
15 think there is a few to make a ruling on those as you see fit.  
16 We didn't feel a need to take up the Court time on those.

17 THE COURT: All right. Thank you.

18 MR. MARTINO-WEINHARDT: Your Honor, I could just name  
19 the ten exhibits and let defense counsel make their objections  
20 to those and then address those objections if that would be --

21 THE COURT: All right.

22 MR. MARTINO-WEINHARDT: -- a way to go through it.

23 So the exhibits would be Curling Plaintiffs'  
24 Exhibit 19, 22, 28, 97, 98, 292, 293, 345, 358, and 198. Those  
25 are the exhibits that plaintiffs are offering through the

1 deposition designations as to which the parties have not  
2 reached agreement.

3 THE COURT: Do I have those -- collection of those in  
4 front of me?

5 MR. MARTINO-WEINHARDT: They are in this binder.

6 THE COURT: In the one that has already been turned  
7 up?

8 MR. MARTINO-WEINHARDT: Yes, Your Honor.

9 The large binder includes both the exhibits which are  
10 agreed and the ones to which there are objections.

11 THE COURT: Since I want my law clerks to be able to  
12 look at them too, if you could just share your book -- a copy  
13 of one of your books now with them.

14 MR. MARTINO-WEINHARDT: I apologize, Your Honor. It  
15 seems maybe that one thick binder has the transcripts. I can  
16 provide the one with the exhibits.

17 THE COURT: Okay.

18 Thank you.

19 Is there an extra one for the clerks just simply so  
20 they can look at -- we'll give you it back --

21 MR. MARTINO-WEINHARDT: We have additional.

22 THE COURT: All right.

23 So Exhibit 19 -- is that PX 63 or is it --

24 MR. MARTINO-WEINHARDT: It is PX 19. It should be at  
25 Tab 8.

1 THE COURT: All right. Tab 8. All right. Fine.  
2 This is Fortalice Solutions' technical assessment prepared for  
3 the Secretary of State draft --

4 **(There was a brief pause in the proceedings.)**

5 THE COURT: All right. Proffered Exhibit 19 was a  
6 Fortalice Solutions' technical assessment prepared for the  
7 Secretary of State Georgia, draft August 25th, 2020.

8 What is the objection?

9 MR. BEDARD: Yeah, Your Honor. I actually think we  
10 can take 19, 98, 292, and 293 all together because they are all  
11 various drafts of the same document.

12 We basically had two substantive objections and then  
13 one kind of note for the record. The first one is just that  
14 they were unauthenticated in the deposition. You know, I  
15 talked through with plaintiffs' counsel if there was another,  
16 you know, area in which they -- there was some authentication  
17 of the document because they were produced by Fortalice. And  
18 there wasn't.

19 And in the deposition that they cited to, there was  
20 no authentication from Mr. Hamilton. So that is -- that was  
21 just our first objection.

22 The second one was --

23 THE COURT: Is Mr. Hamilton going to be joining us?

24 MR. BEDARD: Say that again.

25 THE COURT: Is Mr. Hamilton going to be joining us?

1           MR. BEDARD: He will, Your Honor. I just don't think  
2 he is someone -- because these are produced by Fortalice and  
3 they are drafts from Fortalice's production, he is not exactly  
4 a witness who can authenticate them.

5           And that was -- to that point actually, just for the  
6 note for the record, on all of these, I wanted to note that  
7 these were drafts that were shown to him, self-noted as drafts,  
8 not final versions, which was a concern on our end.

9           And then the third or the second substantive  
10 objection was just hearsay to the extent that they are being  
11 offered for the truth of whatever conclusions Fortalice is  
12 saying they did or didn't do within them.

13           And I'll note on that, to the extent we're discussing  
14 hearsay objections, one of the categories for which we have  
15 already reached an agreement with plaintiffs' counsel is a  
16 category of documents to which we wanted to note a hearsay  
17 objection. And plaintiffs' counsel said we're not offering  
18 this for the truth.

19           Those have already been submitted. So to the extent  
20 we're discussing them now, it is because plaintiffs have said  
21 we do want to offer these for the truth for some reason.  
22 So ...

23           MR. MARTINO-WEINHARDT: Your Honor, I can address  
24 those objections.

25           So Mr. Bedard addressed them as a group. But I

1 actually think these are differently situated. So PX 19 in  
2 particular, defendants made no objection in the proposed  
3 pretrial order. So our position is they have waived any  
4 objection to that.

5 That is Docket 1728 at Page 107 of 847 going by the  
6 ECF numbers. There was no objection made in the PTO to PX 19.  
7 So on that basis, we would argue the objection was waived and  
8 it should be admitted.

9 Going to the substance, however, this -- these were  
10 discussed during the deposition of Mr. Beaver, not  
11 Mr. Hamilton.

12 MR. BEDARD: I'm sorry.

13 MR. MARTINO-WEINHARDT: First as to hearsay, it is  
14 well established in the record by now that Fortalice was the  
15 Secretary of State's agent at this time for conducting  
16 cybersecurity assessments. Mr. Beaver testified to that effect  
17 live. We have the Fortalice Secretary of State contract in the  
18 record as well.

19 That is PX 588. That is in evidence. So it is clear  
20 that Fortalice was acting as the Secretary of State's agent in  
21 preparing these reports. And for that reason they are opposing  
22 party statements and not hearsay.

23 THE COURT: Okay.

24 MR. MARTINO-WEINHARDT: And then briefly as to  
25 authentication, Your Honor, 901(b)(4) states that

1 authentication can be based on the appearance, contents,  
2 substance, internal patterns, or other distinctive  
3 characteristics of a document taken together with all the  
4 circumstances. And Eleventh Circuit law is clear that  
5 authentication can be based solely through the use of  
6 circumstantial evidence. For instance, *United States v. Smith*,  
7 918 F.2d 1501.

8           These Fortalice draft reports were discussed by  
9 Mr. Beaver at his deposition. He testified to the contents of  
10 the assessment that Fortalice was doing. For example, he  
11 testified at his deposition that the summary in those drafts  
12 accurately captured the work that was being done by Fortalice  
13 at the time.

14           Visually and formatting-wise they look just like the  
15 Fortalice reports that are in evidence. They were produced by  
16 Fortalice. And the reports themselves describe in detail the  
17 work that Fortalice did.

18           THE COURT: When you say they were produced by  
19 Fortalice -- and I'm perfectly aware we are dealing with  
20 Fortalice. But are you saying they produced them to you or  
21 that they were produced for the -- for the Secretary of State?

22           MR. MARTINO-WEINHARDT: Fortalice produced them to us  
23 in the litigation.

24           THE COURT: In the litigation. So you had a subpoena  
25 or did you guys request them?

1 MR. CROSS: I can help with that, because he may not  
2 remember. There was a dispute with the State on getting  
3 documents and deposition testimony from Fortalice. Your Honor  
4 tabled the issue of a deposition and directed the State to  
5 direct Fortalice, as I recall, to produce the documents.

6 And so that is how we did it. It was not a subpoena  
7 enforced on Fortalice because we were going to have to do that  
8 in North Carolina.

9 Your Honor found that because they were operating as  
10 an agent the documents were within the possession, custody, and  
11 control of the State, which turned out to be right because  
12 Fortalice did produce the documents at the direction of the  
13 State in response to your order.

14 MR. MARTINO-WEINHARDT: So all --

15 THE COURT: All right. Well, obviously the  
16 authentication one is not going to hold up.

17 But anyway, what else? What next?

18 And I'm just -- you know this -- I hope this is not  
19 the character of some of the other objections raised by the  
20 State. Because this seems kind of flaky, frankly, the  
21 objections here relative to, you know, making a good faith  
22 objection that something really is -- given the fact that the  
23 role that was played by Fortalice in this time period, that it  
24 was an agent, that it produced these documents on behalf of the  
25 State, and that the State's personnel have looked at it, have

1     been deposed about it.

2             It just seems sort of flaky, frankly, to be -- for us  
3     to be fighting about that at this point. I mean, I can say  
4     more legalistic reasons. But that is my reaction as a whole  
5     just relative to moving through this with some time --  
6     proceeding with -- on an expeditious basis.

7             So tell me what are the -- I mean, I will obviously  
8     look at it. But tell me what the other objections are that are  
9     not to -- because there are one, two, three, four, five, six  
10    other documents.

11            MR. BEDARD: Sure. Just quickly on those Fortalice  
12    ones, just so the record is clear, again our -- the  
13    authentication was one, but it was hearsay on the other ones.  
14    And the biggest issue about the authentication piece is just  
15    that they are self-marked as drafts, not as finals.

16            THE COURT: I'm sorry. You're going to have to slow  
17    down.

18            MR. BEDARD: Sorry.

19            They are just self-marked as drafts. That was kind  
20    of the biggest point beyond the hearsay objection.

21            THE COURT: Right. But even if they are drafts, they  
22    are drafts that were reviewed apparently by Mr. Beaver in his  
23    capacity as chief information officer.

24            MR. BEDARD: I've got no objection to Mr. Beaver's  
25    testimony in the deposition on that basis, Your Honor. I just



1 think the Court should rely on Mr. Beaver's testimony rather  
2 than the documents themselves.

3 THE COURT: All right.

4 MR. BEDARD: That is the point I'm trying to get  
5 across.

6 THE COURT: All right. Well, we will take a look at  
7 it.

8 MR. BEDARD: I do apologize for saying Mr. Hamilton.

9 THE COURT: That's all right. No problem. I mean,  
10 everyone has a lot they are juggling, and I didn't mean -- the  
11 flaky remark was not directed at you personally.

12 MR. BEDARD: That was fine.

13 THE COURT: It was an element of candor. That is  
14 all.

15 MR. BEDARD: I think briefly on Plaintiffs'  
16 Exhibit 22 and Plaintiffs' Exhibit 28, I actually do think  
17 Mr. Fisher and I had reached an agreement yesterday.

18 Our only objection was going to be the extent it was  
19 suggesting a legal conclusion on Mr. Hamilton's part in that  
20 exhibit. Mr. Fisher said they are not -- they are fine with  
21 that. So we're fine to move along with those.

22 THE COURT: 22 and 28 are okay?

23 MR. BEDARD: Yes, that is fine with that  
24 understanding.

25 THE COURT: All right. Fine. Great.

1 MR. MARTINO-WEINHARDT: Correct, Your Honor.

2 MR. BEDARD: What is -- the ones I have are based on  
3 an order from an email from Mr. Fisher, so they are a little  
4 out of order. So whatever is next for you, Your Honor.

5 THE COURT: I have -- the remaining ones I had were  
6 97, that is the -- and then three others.

7 MR. BEDARD: So 97.

8 MR. MARTINO-WEINHARDT: Your Honor, I think there are  
9 several where the objections were the same as to the Fortalice  
10 report we just discussed because there are other Fortalice  
11 reports. That would be 97, 98, 292, and 293.

12 THE COURT: Right. But we already discussed those.  
13 We just didn't discuss 97.

14 Is 97 something different than the others?

15 MR. BEDARD: No, 97 is one of the Fortalice.

16 THE COURT: It is one of the Fortalice ones. Okay.  
17 We'll take a look at those.

18 MR. BEDARD: That is fine.

19 THE COURT: Then the next ones are 345, 358, and 498.

20 MR. CAMPBELL: I think it is 198, Your Honor.

21 THE COURT: Okay. Sorry. 345, 358, and 198. Excuse  
22 me.

23 MR. BEDARD: So on 345, Your Honor, these come from  
24 the deposition of Mr. Felicetti. They are supposedly texts  
25 between Ms. Cathy Latham and Scott Hall. Mr. Felicetti is not

1 obviously part of those conversations.

2 I believe in the deposition it was conveyed to him  
3 that these had come from Mr. Maggio's phone. They are not --  
4 they weren't Bates labeled, to my recollection.

5 So the two things we had were, again, an  
6 authentication issue. Mr. Maggio was up here. They could have  
7 been presented to him to authenticate them. I'm not aware that  
8 they have been. And I was willing to withdraw it if there was,  
9 you know, somewhere in the record plaintiffs could point me to.  
10 But I hadn't heard that.

11 So we had an authentication issue and then just a  
12 hearsay objection, which again the Court can, I think, take  
13 that and note that for the record. But those were our two  
14 objections.

15 THE COURT: All right. Is there any other place  
16 Counsel maintains that you had these documents authenticated?

17 MR. CAMPBELL: Yes, Your Honor. In Mr. Felicetti's  
18 deposition, he does state that that is what the document is.  
19 It is on Page 113, Lines 9 through 14. He states that the  
20 texts are between --

21 THE COURT: Well, but has he seen them or he is the  
22 recipient? He can say I can see it. How does that make him  
23 able to authenticate it?

24 MR. CAMPBELL: He is not the recipient, Your Honor.  
25 He had testified that that -- or he had said under oath that is

1 what the document was.

2 And, Your Honor, also as to --

3 MR. CROSS: He was a 30(b)(6) witness, just to be  
4 clear. So he was testifying on behalf of SullivanStrickler,  
5 not in an individual capacity.

6 THE COURT: Okay. So you're saying, Mr. Cross, that  
7 in his 30(b)(6) capacity he was able to testify and confirm  
8 that this was a text between Mr. -- Ms. Latham and who? I'm  
9 sorry.

10 MR. CROSS: Mr. Maggio.

11 THE COURT: Mr. Maggio?

12 MR. CAMPBELL: Yeah. And Mr. Hall.

13 MR. CROSS: And that, as we have seen with the other  
14 evidence, those texts were part of the work that Mr. Maggio was  
15 doing for SullivanStrickler. This wasn't sort of on the side.  
16 This was they were engaged to do this work. And Mr. Felicetti  
17 testifying on behalf of the corporation authenticated those  
18 documents.

19 THE COURT: I see. All right.

20 Now, with that clarification.

21 MR. BEDARD: Yeah. Can we have control of the  
22 documents? Because my recollection Mr. Maggio, one, is not  
23 part of that conversation. I could be corrected. But I think  
24 it is just between Ms. Latham and Mr. Hall.

25 So if we could have control. Again, I'm more than

1 willing to be corrected. My notes ...

2 While they work that out -- and we can check that,  
3 Your Honor --

4 THE COURT: It is the clear to the gentleman to  
5 operating the machine? Are you looking -- it's over here? All  
6 right.

7 MR. BEDARD: I think to the other points --

8 THE COURT: Yes.

9 MR. BEDARD: -- my understanding is, again, these  
10 came from Mr. Maggio's personal phone, according to the  
11 representation from counsel in that deposition.

12 If they were produced pursuant to a subpoena to  
13 SullivanStrickler, then maybe that is a slightly different  
14 issue. But again, I don't think in the deposition -- all  
15 Mr. Felicetti could do is say I see that is what you're putting  
16 in front of me.

17 THE COURT: Well, I think the real question is  
18 whether they produced them pursuant to the subpoena that  
19 attended his deposition. So ...

20 MR. BEDARD: And see these are text messages  
21 between --

22 MR. FISHER: Your Honor, if I may. This is Ramsey  
23 Fisher. I just want to read the portion of the deposition  
24 testimony through which we are offering this document.

25 THE COURT: All right.

1 MR. FISHER: This is a text thread between Paul  
2 Maggio and Cathy Latham; right?

3 Yes, sir.

4 And this comes from Paul Maggio's phone; right?

5 Yes, sir.

6 So Dean Felicetti, in the deposition as a 30(b)(6)  
7 witness, authenticated that these text messages came from Paul  
8 Maggio's phone and that this was a text conversation between  
9 Cathy Latham and Paul Maggio.

10 Now, there's two texts on the screen. One is a text  
11 thread between Cathy Latham and Paul Maggio. The other one is  
12 a text thread between Scott Hall and Paul Maggio.

13 THE COURT: So how do I tell?

14 MR. FISHER: What was that?

15 THE COURT: So when she -- I'm having trouble -- is  
16 the green Maggio?

17 MR. FISHER: That's right.

18 THE COURT: All right. And that's between Maggio and  
19 Ms. Latham?

20 MR. FISHER: Correct.

21 THE COURT: And you had -- and your subpoena  
22 requested this? Your 30(b)(6) notice?

23 MR. FISHER: That's right, Your Honor. Correct.

24 THE COURT: All right. I think that is sufficient  
25 foundation for introduction of this then with Mr. Felicetti

1 serving as a 30(b)(6) witness and Mr. Maggio being an employee  
2 or partner, doesn't matter whichever. He is producing it. He  
3 has produced it and is verifying that that is what it is.

4 All right. So let's move on past that one. That was  
5 345. It is admitted.

6 And 358?

7 MR. BEDARD: Yeah. 358 was just briefly -- and I  
8 think there may have been some back-and-forth with plaintiffs  
9 about this. It is solely -- it is an email from Scott Hall to  
10 Alex Cruce forwarding an email from Misty Hampton attaching  
11 some files that are labeled ICC log and S log files.

12 Mr. Cruce -- we've got no issues with the emails  
13 themselves. The issue is about where did the attachments come  
14 from and what are the attachments.

15 Mr. Cruce, throughout his deposition, says I don't  
16 know where the attachments come from, I don't know what they  
17 are. So it was just an authentication question as to what the  
18 attachments were, or potentially a lack of foundation, however  
19 the Court wants to characterize it, as to what those  
20 attachments are and where they came from.

21 MR. CAMPBELL: Your Honor, we're not trying to  
22 authenticate the attachments within the email. We are more  
23 showing that there was an email that was sent with those  
24 attachments and the attachments were sent from Hall -- Mr. Hall  
25 to Mr. Cruce and Ms. Hampton. That is -- we're not trying to

1 authenticate --

2 THE COURT: Just go over who -- from Scott Hall to  
3 Alex Cruce and then also from -- to Hamilton?

4 MR. BEDARD: I think I can clarify this. I believe  
5 the underlying email is from Misty Hampton to Scott Hall.  
6 Scott Hall forwards that to Alex Cruce. It is at least what  
7 the documents are saying.

8 The original email from Misty Hampton had attachments  
9 to it. Those get forwarded to Alex Cruce through Scott Hall.  
10 The question is just the authentication of the attachments to  
11 the email.

12 THE COURT: All right.

13 MR. BEDARD: Because he said he couldn't -- he didn't  
14 know where they came from. If plaintiffs are saying we are not  
15 offering it for that, then that is fine.

16 THE COURT: That is what I heard him saying.

17 MR. CAMPBELL: Yes, Your Honor.

18 THE COURT: All right. Well, then that is resolved  
19 too.

20 And 198?

21 MR. BEDARD: Yeah.

22 THE COURT: So the substance of 358 is in. It is  
23 just the attachment is -- reference to the attachment is okay.  
24 It is just it is not being admitted for purposes of showing the  
25 content of the --



1 MR. BEDARD: Exactly. And there is no actual content  
2 to the email. It is just the email. So I have got no  
3 authentication issues with the email.

4 THE COURT: All right. And 198?

5 MR. BEDARD: Yeah. 198 is an email from Dominion to  
6 Gabe Sterling. And our objection was just as to hearsay as to  
7 the truth of the underlying email from Dominion to  
8 Mr. Sterling.

9 Again, I think we could have potentially included  
10 this in the previous category, but my understanding is  
11 plaintiffs have a position that the truth of the underlying  
12 email should be admitted for the truth. And that would be our  
13 objection.

14 THE COURT: Okay.

15 MR. CAMPBELL: Your Honor, with this one, it is a  
16 party opponent statement. There is no hearsay. It is from  
17 Mr. Sterling and it is to Dominion.

18 We have heard --

19 THE COURT: So it is not Dominion to Gabe Sterling  
20 but Sterling --

21 MR. CAMPBELL: Mr. -- Dominion to Mr. Sterling.

22 Mr. Beaver has testified that Dominion was an agent  
23 of the State for the purposes of election security. With that  
24 agency in mind, this is a party opponent email to a party  
25 opponent. We don't think that hearsay factors in here.

1 MR. BEDARD: Our response to that, Your Honor, I  
2 think is, we've had discussions about the status of Dominion  
3 previously. Our position is the contracts are clear that  
4 they're an independent contractor.

5 And as Your Honor notes -- you know, if they were a  
6 party opponent, I think they could have been allowed to testify  
7 here, but ...

8 THE COURT: Well, the only thing is, is it true  
9 Mr. Beaver unequivocally stated in his testimony that Dominion  
10 was functioning and had assumed the responsibility of being  
11 the -- essentially the -- exclusively responsible for security  
12 issues on behalf of the Secretary of State?

13 MR. BEDARD: I don't think that changes their  
14 independent contractor status, Your Honor. I think you can  
15 hire outside information security professionals, for example,  
16 I'm sure, you know -- and that doesn't necessarily all of a  
17 sudden turn them into an agent and a party opponent for  
18 purposes of hearsay. Corporations do this all the time.

19 I'm not sure what the internal workings are of the  
20 court as far as their IT security professionals, but that may  
21 be the case for the court too.

22 THE COURT: They are ours I think for the reasons you  
23 might guess.

24 MR. BEDARD: But just to make the point I think,  
25 independent contractor status for IT professionals is regular

1 and I don't think that turns them into agents.

2 MR. BROWN: Your Honor, this is Bruce Brown for the  
3 Coalition Plaintiffs.

4 On this point, the hearsay rules allow evidence that  
5 comes in that has a sufficient reliability. The State is  
6 taking a very unusual position that the statements by their  
7 contractor hired to manage the security of the State's election  
8 system is not reliable enough to be admitted into evidence.  
9 That is what we're hearing.

10 We think this is just a game to waste time and give  
11 us trouble getting in evidence that is clearly admissible.

12 THE COURT: What I'm really confused about is this.  
13 198 is a one-page exhibit. That is the one we're talking about  
14 right now. And it is -- it is a letter from -- or email from  
15 Gabriel Sterling to Beau Roberts at Dominion. So I'm ...

16 MR. BEDARD: The underlying email, Your Honor, from  
17 Dominion to Gabe.

18 THE COURT: Well, where is that?

19 MR. BEDARD: It is just lower down. It begins with  
20 the on Monday, December 20th.

21 THE COURT: I see.

22 So let me just ask plaintiffs' counsel: Are you  
23 actually -- does it make a difference to you that -- the  
24 information contained in here? For instance, as to the  
25 Paulding County server and work station were not communicating

1 with each other, regional tech reconciled the issue and sent  
2 log file to engineering, tell me what the relevance of that as  
3 well -- then another one was DeKalb County had issues with  
4 absentee ballots not scanning.

5 I mean, he's reporting in. Does it matter what he's  
6 reporting in, Mr. Roberts?

7 I mean, I realize what the question is that  
8 Mr. Sterling --

9 MR. CROSS: No, Your Honor.

10 THE COURT: -- asks is are they duplicating them on  
11 hand-marked or BMD. That is -- obviously can be admitted for  
12 the truth of what it is saying. But it is really just a  
13 question. That is from Mr. Sterling.

14 So I'm just really -- are we fighting about anything  
15 here?

16 MR. CROSS: No. It is a fair question. We think it  
17 comes in for the truth, but we do not need to offer it for the  
18 truth. So we'll simplify and say we are not. The Court will  
19 not take it for that purpose.

20 THE COURT: All right. Very good.

21 MR. BEDARD: Thank you, Your Honor.

22 THE COURT: Let's take a break for five minutes, and  
23 we'll keep on running. What is next?

24 MR. MARTINO-WEINHARDT: I have one last bit of  
25 housekeeping. One trial exhibit on which Your Honor deferred

1 ruling on admissibility.

2 THE COURT: Which one is that?

3 MR. MARTINO-WEINHARDT: That is Exhibit 261.

4 THE COURT: What is it?

5 MR. MARTINO-WEINHARDT: If I may approach. This was  
6 an email that was offered during the testimony of Mr. Chris  
7 Harvey.

8 THE COURT: Harry, could I see it?

9 Thank you.

10 All right.

11 MR. MARTINO-WEINHARDT: Your Honor, defendants had  
12 raised a hearsay objection which they appear to be standing on.  
13 We're not offering it for the truth. Whether true or not, the  
14 statements were made and the Secretary of State's office had  
15 notice of what those were. So it is an effect on the listener.  
16 It is not offered for the truth.

17 THE COURT: Well, I'll admit it on that basis.

18 MR. MARTINO-WEINHARDT: Thank you, Your Honor.

19 THE COURT: It is not for the truth of each of the  
20 statements.

21 MR. TYSON: And, Your Honor, we would just add for  
22 the State that our -- the basis for that is that the notice and  
23 the effect on the Secretary really doesn't matter unless the  
24 underlying report is true, which was the basis for our  
25 objection.

1           THE COURT: Well, it is not completely so, because  
2     you're being -- you're being notified of problems, what do you  
3     do to follow up on them. You have a competent person who has  
4     raised the questions from Georgia Tech. It is not some just  
5     average citizen who has no computer experience who is bringing  
6     this to the attention of the highest levels in the department.

7           I think it has a -- it has a limited value. But it  
8     is allowed for the purpose of the fact that he received it.  
9     The individuals received it, the Secretary of State's office,  
10    and it was bringing them attention problems they thought were  
11    of significance. Whether that is true or not is another  
12    matter. So ...

13          All right. On that basis, it is admitted.

14          MR. MARTINO-WEINHARDT: Thank you, Your Honor.

15          THE COURT: I'm going to look at the other ones we  
16    were talking about, that were the group ones from Fortalice  
17    and -- during the five-minute break.

18          MR. MARTINO-WEINHARDT: Thank you, Your Honor.

19          THE COURT: What is after this, if anything?

20          MR. CROSS: The motion on the Fifth Amendment. I  
21    imagine they have a response.

22          THE COURT: All right. Well, we'll do it later then.  
23    And I think that I see, Counsel --

24          MR. OLES: There is -- Mr. Davis is here and the  
25    matters of our proffers, Judge.

1 THE COURT: Okay. We'll deal with that too.

2 Good morning, Mr. Davis.

3 MR. DAVIS: Good morning.

4 Sorry for the delay.

5 THE COURT: No problem. No problem.

6 This is the break we have before we break for lunch  
7 so it won't be long.

8 COURTROOM SECURITY OFFICER: All rise.

9 **(A brief break was taken at 11:42 AM.)**

10 THE COURT: All right. I'm getting to the point  
11 where it is such a messy desk here and all the different  
12 notebooks coming up that it is kind of miserable.

13 Okay. So what we were left with was the -- the  
14 documents from Fortalice. And as I understand it, counsel have  
15 confirmed that each one of the reports dealt with a different  
16 matter. They were not just different drafts of the same  
17 report.

18 Is there any contention as to that?

19 MR. BEDARD: No, Your Honor.

20 THE COURT: Okay. Well, having reviewed many  
21 Fortalice reports in the past and understanding the role that  
22 Fortalice played during that time frame as the contractor and  
23 the chief contractor for -- for the Secretary of State's office  
24 relative to security issues like in the election realm and  
25 other realms as well, I would say that this report has all the

1       indicia of reliability.

2               And while they might be drafts, there is no  
3       indication that they are successive drafts. If the Secretary's  
4       office wants to present information that they are -- it was not  
5       the final draft or the final version, they're welcome to do  
6       that. But they are the evidence that the -- in the reports  
7       that Fortalice produced to plaintiffs.

8               And I think under those circumstances that they do  
9       have all of the essential earmarks of authenticity and being  
10      business records of Fortalice that make them acceptable. And I  
11      therefore will admit them.

12              So I think that takes care of all of those issues.

13              Are we through with the document -- is there anything  
14      else I haven't dealt with as to the documents?

15              All right. So we're moving on now to discussing the  
16      motion for -- relative to the request that I make an inference  
17      or that the deposition testimony and the taking of the Fifth  
18      gives rise to an inference that I should make against the  
19      Secretary of State's office.

20              I'm just wanting to make sure I have everything here  
21      on this.

22              Well, let me allow defense counsel to address these  
23      first. I know I have your positions. I think really the  
24      question I have is -- really it ultimately relates to is this  
25      a -- the adverse inference, is that against each of the



1 individuals or are you asking for it to be taken against the --  
2 which seemed to be what you were arguing -- what the plaintiffs  
3 were arguing, that the testimony should be considered relative  
4 to the defendants' liability in this case?

5 Is that -- am I correct?

6 MS. KAISER: Your Honor, we would say that the  
7 adverse inferences should be drawn against the individual  
8 witnesses.

9 THE COURT: Just the individual witnesses, not the --

10 MS. KAISER: Yes.

11 THE COURT: Okay. I thought you were somehow -- from  
12 what you had submitted, that it was a more far reaching that  
13 you were -- what you were arguing about. But that is a whole  
14 other matter then.

15 Go ahead.

16 MR. MILLER: Your Honor, to be clear, the essence of  
17 that would be to draw the inference against the State  
18 defendants who would not be able to dispute it, to  
19 cross-examine the individual that took the Fifth Amendment.

20 So the issue is, as I understand plaintiffs' motion,  
21 they are seeking to establish the facts on the basis of the  
22 nonparty invoking the Fifth Amendment such that the State is  
23 then, you know, stuck defending in this case with that fact  
24 already established based solely on the Fifth Amendment  
25 inference.

1           If the Court would like to hear, you know, argument  
2 as to the substance, I'll be truthful, Your Honor, I don't  
3 think much has changed since we discussed this in the motion in  
4 limine context.

5           THE COURT: I see.

6           MR. MILER: There is no loyalty existing between  
7 these individuals. Quite the opposite.

8           THE COURT: I guess this is what is confusing to me.  
9 I mean, why -- and I am trying to understand it -- is that  
10 plaintiffs say then that this -- for instance, on Mr. Chaney --  
11 let me just begin on Page 4 of this, which is, I guess,  
12 Document 1793 at the ECF Page 7.

13           This was about Ms. Latham staying at the Willard  
14 Hotel on or around December 17, 2020, the same day that one of  
15 the two executive orders -- draft executive orders was drafted.  
16 And you're saying today that you can't tell us anything about  
17 your involvement with that. And the Fifth Amendment.

18           And then they say -- and there's lots of other  
19 testimony about her staying at the Willard Hotel. Only adverse  
20 inference they ask for here is that Ms. Latham was in DC  
21 staying at the Willard Hotel on or around December 17, 2020.

22           So it doesn't mean that that is against -- the  
23 inference is not one, one way or the other, that is against the  
24 State. It simply says under these circumstances this is the --  
25 as a proper adverse inference when she took the Fifth.

1 MR. MILLER: Your Honor, I respectfully -- I disagree  
2 with the plaintiffs here. The -- getting to the question as to  
3 whether it is a proper adverse witness requires establishing  
4 the factors from *Coquina*.

5 THE COURT: Right.

6 MR. MILER: There is a complete absence of those  
7 factors. Your Honor, we discussed this with plaintiffs'  
8 counsel before. I think they wanted to forgo their side of  
9 argument on the motion. I'm happy to argue the motion's  
10 substance. I do --

11 MR. CROSS: That is not what we said.

12 THE COURT: All right.

13 MR. MILLER: I'm sorry. To clarify, forgo opening  
14 argument on the motion. I do think they are going to want to  
15 reply.

16 Does that correct it?

17 THE COURT: You know, tell me what -- how you want to  
18 handle this.

19 MR. CROSS: We propose exactly what Your Honor  
20 started with. Let them respond to the motion and we would  
21 respond. That is all. We're trying to be efficient. We did  
22 not waive argument.

23 THE COURT: I guess, let me just say, the most  
24 fundamental issue I can see here is -- just in terms of  
25 clarifying the dispute for me, is the State's contention that

1 every adverse inference they ask for is really an adverse  
2 inference against the -- against the State, is what you said to  
3 me, or the Secretary of State's office.

4 MR. MILLER: Your Honor, it establishes a fact in this  
5 case against the State as the defendants. So I don't think  
6 they are trying to draw that -- I don't know if the Secretary  
7 of State was at the Willard Hotel. But it establishes a fact  
8 in the case that we are the defendants in.

9 THE COURT: But some of these, such that as  
10 Ms. Latham was in DC staying at the Willard Hotel -- I mean, I  
11 can't imagine that you would actually contest it is not true.

12 MR. MILLER: Your Honor, it skips a step here,  
13 respectfully, because the starting point is, I'm not sure what  
14 the relevance is.

15 But setting that aside, the issue becomes, you know,  
16 at this point we're establishing facts that are immaterial to  
17 the case. It is not about a vulnerability, you know, and facts  
18 that the State is now going to have to contest against as to  
19 how this is going to fit into the plaintiffs' case with a  
20 witness that is outside of the subpoena range that has invoked  
21 her Fifth Amendment right not to testify.

22 Your Honor, I can't sit here and tell you whether or  
23 not Ms. Latham was at the Willard Hotel or not. I certainly  
24 wasn't there. But, you know, the question here becomes a  
25 nonparty witness that is not here for the judge to evaluate or

1 the Court to evaluate the reliability of the testimony.

2 You know, what facts are we establishing. And then,  
3 frankly, if it is an irrelevant fact there is no need for  
4 establishing that fact and it shouldn't be admitted into  
5 evidence anyway.

6 MS. KAISER: Your Honor, if I may just briefly make  
7 one point, which is that counsel for the State was present at  
8 each of these depositions and had the opportunity to question  
9 each of these witnesses.

10 MR. MILLER: Your Honor, may I just briefly go  
11 through the *Coquina* factors here? Because I think it will --

12 THE COURT: I read *Coquina* over again this morning.  
13 So I don't think that that is helpful. I think it would be  
14 helpful to -- if you want to argue about it relative to each of  
15 these. I'm not saying I'm wild about drawing all sorts of  
16 inferences. And there might be some that it is proper and some  
17 here that are not.

18 What I will say is I was confused by the memoranda  
19 from plaintiffs about this because it did seem like you were  
20 trying to bind -- bind the State through these. And it seems  
21 to me there are some adverse inferences that could be drawn  
22 that -- one way or the other that are simply to make the record  
23 clearer that are not -- that might be appropriate. But there  
24 are other ones that are not. So ...

25 MS. KAISER: Your Honor, if I may just direct you to

1 one sentence in the introduction of our brief. It is in the  
2 middle of Page 1. The inferences plaintiffs seek concerns  
3 specific concrete facts for which the invocations are the only  
4 available proof. Plaintiffs are not seeking an inference of  
5 defendants' liability.

6 THE COURT: But then you say on Page 14 here  
7 defendants and the Coffee County witnesses are indeed aligned  
8 with respect to the Fifth Amendment invocations.

9 MS. KAISER: Your Honor, I think what we meant there  
10 is that there is really no indication here. The *LiButti* factor  
11 is cited in the *Coquina* case. They are intended to get at the  
12 trustworthiness of the invocations.

13 We do not think there is any indication here that  
14 these Fifth Amendment invocations were not trustworthy. There  
15 is no indication that the witnesses were taking the Fifth  
16 Amendment in order to harm the defendants' position in this  
17 case.

18 Every indication is that they were genuine  
19 invocations of the Fifth Amendment.

20 THE COURT: Well, *Coquina* and *LiButti* really are, in  
21 substantial part, also focused on who is an agent for purposes  
22 of binding somebody else and whether it is a daughter and her  
23 father or it is an agent -- somebody who is an officer of the  
24 bank and then the bank itself. Here we're in a somewhat  
25 different posture other than -- so ...

1 MS. KAISER: Your Honor, I would just say that --

2 THE COURT: That's the reason why I found it  
3 confusing, frankly, as to what the plaintiffs were saying on  
4 one hand in the introduction versus what they say -- a few say  
5 later on.

6 MS. KAISER: And, Your Honor, I guess what I would  
7 say is you have heard over and over throughout this case that  
8 the State relied on the counties to safeguard the election  
9 equipment.

10 So with respect to the conduct that is at issue, we  
11 do think that there is not necessarily an agency relationship  
12 but absolutely a relationship between the State and the  
13 counties when it comes to physically securing the election  
14 equipment.

15 THE COURT: Well, there is a relationship. But that  
16 doesn't mean that something that somebody says in the county is  
17 binding or who is a bad actor for the county even if they are a  
18 county officer or they are a county -- someone else in the  
19 county that it is binding on the State. It might have  
20 implications.

21 So really in the end what is useful for me to hear at  
22 this point -- and we may just have to revisit it after lunch,  
23 but -- is the concern that counsel for the State argues is  
24 that, you know, if I accept anything -- of these as binding and  
25 on the party making the statement, then it doesn't -- then it

1 will also -- if it is an established fact via that then it is  
2 going to be binding ultimately on the Secretary of State.

3 And they contend that is not fair, as you know.  
4 So -- because they won't have had an opportunity, they say, to  
5 have challenged whatever the inference is.

6 So answer that instead. Because I think that would  
7 be helpful.

8 MS. KAISER: Sure, Your Honor. Yes.

9 I think -- we are not saying that the testimony of  
10 these witnesses is binding on the State or the Secretary of  
11 State. They have the opportunity to rebut any of these  
12 inferences in their case. So maybe that is where the  
13 disconnect is.

14 And they had the opportunity to ask these witnesses  
15 questions at the deposition. They have the opportunity to put  
16 in evidence in their case if they think there is evidence that  
17 contradicts any of these inferences and could rebut the  
18 inferences. So it is not an ultimate finding of fact.

19 THE COURT: Do you want to respond?

20 MR. MILLER: Sure, Judge, if I may.

21 I want to correct one issue I said with respect to  
22 the State relying on the counties. You know, the State  
23 certainly does rely on county election superintendents to  
24 fulfill their independent legal obligations under Georgia law  
25 that they took an oath to uphold.



1           So, you know, if that is the nature of the loyalty of  
2     the relationship that we're using to establish, you know, an  
3     adverse inference, then in that instance it turns the entire  
4     concept on its head such that, you know, the Peace  
5     Officer Standards and Training Council is then subject to a  
6     nonparty adverse witness just because a police officer invoked  
7     the Fifth Amendment in some unrelated context.

8           And particularly as to these witnesses here, Your  
9     Honor -- and this was discussed at length in our motion in  
10    limine, that this is a unique issue where we have got text  
11    messages that were used in the same depositions. In fact, one  
12    of them was a portion of a prior request for the adverse  
13    inference, that showed that these individuals were directly  
14    working to try and do anything they could to harm Governor Kemp  
15    and Secretary Raffensperger.

16           That does not show any relationship or control or  
17    loyalty between these individuals.

18           And to add to that, Your Honor, Ms. Latham and other  
19    of the witnesses who is in here -- but she sought to recall the  
20    Secretary of State, you know, and put forth a recall petition  
21    to put the Secretary back on the ballot under the recall  
22    process under Georgia law.

23           But, you know, with respect to the specific factual  
24    inferences they are seeking to admit, to the extent that it  
25    does not go to establishing liability under Section 1983, then,

1 Your Honor, that is inadmissible as irrelevant evidence.

2 And that is an Eleventh Circuit case, *Cook ex Rel.*  
3 *Estate of Tessier v. Sheriff Monroe County*. That is 402 F.3d  
4 1092, at 1105. That is an Eleventh Circuit from 2005.

5 That case isn't dealing with adverse inferences but  
6 it is dealing with the issue of admissibility in a 1983  
7 liability case.

8 So even if we get there, to establishing the *LiButti*  
9 factors that this would be an appropriate circumstance under  
10 which to draw the inference, which I respectfully submit it is  
11 not, it is still irrelevant and thus inadmissible with respect  
12 to establishing 1983 liability of the State defendants.

13 THE COURT: Okay. Matt?

14 **(There was a brief pause in the proceedings.)**

15 THE COURT: Is there anything further that  
16 plaintiffs' counsel wish to say?

17 MS. KAISER: Thank you, Your Honor.

18 I would just say I think some of the facts that  
19 Mr. Miller was just reciting are, frankly, irrelevant, because  
20 the purpose of the *LiButti* factors is not to establish whether  
21 there is loyalty between the party and the nonparty.

22 Again, it is to -- it is to assess whether the  
23 invocation of the Fifth Amendment is genuine or whether there  
24 is some indication that the nonparty invoked the Fifth  
25 Amendment in order to torpedo the parties' litigation position

1 or otherwise damage the party to the litigation.

2 And we maintain there is simply no evidence of that  
3 here and that under all of the circumstances these were -- the  
4 evidence indicates that these were genuine invocations of the  
5 Fifth Amendment. They are supported by corroborating evidence  
6 in the record. And we believe that these are trustworthy  
7 invocations.

8 Again, the purpose is not to bind the Secretary of  
9 State. It is simply to help the Court connect the dots on the  
10 Coffee County breaches, which Mr. Skoglund confirmed yesterday  
11 was the largest election security breach in recent U.S. history  
12 and has serious implications for the security of Georgia's  
13 voting system in future elections.

14 MR. MILLER: Your Honor, if I may just briefly,  
15 because that goes to the *LiButti* factor, the compatibility of  
16 the interest.

17 The inquiry there is, as it states in *LiButti*,  
18 compatibility of the interest of the party and nonparty and the  
19 outcome of the litigation.

20 You know, whether for better or worse, these  
21 individuals that are down there were out there looking for Hugo  
22 Chavez' ghost on the Dominion machines. They do not want to  
23 have Dominion machines run in Georgia. Different motivations.  
24 But they have the same outcome aligned in the interest of the  
25 litigation.

1           And that is with the plaintiffs, not with the  
2 defendants. And, you know, Your Honor, that is where the  
3 inquiry comes in. That is specifically what *LiButti* calls for.  
4 And it is just not -- it is not met here.

5           THE COURT: Okay. Well, I'm going to think about all  
6 that you-all have said and we'll take a lunch break. Because  
7 there were some difficult issues that you also had raised in  
8 connection with what we're going to discuss late in the day,  
9 I'm going to take a full hour break today.

10           Who is the first witness that the State -- you're  
11 going to rest? I guess the plaintiff is going to rest other  
12 than -- is that right? -- at this juncture?

13           MR. CROSS: We are going to rest other than resolving  
14 the Mr. Persinger issue since that also bears on the merits.

15           THE COURT: Okay. Is the Persinger matter that we  
16 said we would address at 4:00 P.M.?

17           MR. CROSS: Correct.

18           THE COURT: So you're not going to rest, in fact, or  
19 are you saying we should just stay open? What --

20           MR. CROSS: Yeah. I mean, I think they should go  
21 ahead and call their first witness because we've scheduled  
22 Mr. Persinger. Our case will remain open with that sort of  
23 caveat because we just have to resolve that.

24           MR. TYSON: And, Your Honor, from our perspective, I  
25 don't think we can -- if there is an open issue of the

1 evidence, our 52(c) motion is when the evidence has closed from  
2 the plaintiffs. So ...

3 THE COURT: I don't know why you didn't raise that  
4 though yesterday -- I mean, I'm going to hear your argument.  
5 But in terms of the schedule I wish you had raised that  
6 yesterday.

7 MR. TYSON: And, Your Honor, I may have misunderstood  
8 Mr. Cross. I didn't understand that the Mr. Persinger issues  
9 were related to the merits of their case at all. I thought  
10 that was a separate issue at this point in the case, which is  
11 why I didn't think it was a part of that.

12 THE COURT: I see.

13 MR. CROSS: That is in my email on Saturday, and I  
14 also said it multiple times yesterday.

15 MR. TYSON: I apologize. I misunderstood that. That  
16 was the reason why I didn't think it was part of the  
17 plaintiffs' case.

18 THE COURT: All right. And I know that you had  
19 something to say, Mr. Oles.

20 MR. OLES: As a matter of proffers.

21 THE COURT: Go ahead.

22 Do you have something else? You wanted to call  
23 somebody or --

24 MR. OLES: Well, I have my client here if the Court  
25 wanted to hear from him.

1 THE COURT: About the --

2 MR. OLES: About his request on the electronic  
3 equipment.

4 THE COURT: Sure.

5 Mr. Davis, would you come up here for a moment.

6 Thank you.

7 Just right here is fine. I'm just going to ask you a  
8 question or two. Okay.

9 I understand you want to be able to bring a cell  
10 phone and your computer to be here so that you can come in and  
11 out of the court and do work; is that right?

12 MR. DAVIS: That is correct.

13 THE COURT: If you do that, do you understand I would  
14 have the -- have to ask you this question, first of all, you  
15 understand that I will -- it would not be appropriate to start  
16 taping or recording anything that is happening in the  
17 courtroom?

18 MR. DAVIS: I understand that, Your Honor. I was  
19 apprised of that before I came in the trial.

20 THE COURT: Okay. And you understand that you can't  
21 be putting out Tweets while you are here either? I'm not  
22 saying you ever did. I'm just saying this is -- I'm not  
23 looking for you to be sending out any type of social media  
24 communications while you are in the courtroom.

25 MR. DAVIS: Absolutely. Absolutely.

1           THE COURT: And my understanding is you are -- this  
2 is just simply so you can be in communication probably with  
3 your family or with work.

4           MR. DAVIS: That is correct.

5           As a matter of fact, this morning I was in the middle  
6 of a testing call for a system that we were remediating. They  
7 found some problems with the system. We were testing the fix.

8           And then due to the discussions earlier today that I  
9 did not hear, I had to shut down that meeting and leave that  
10 meeting so that I could take care of the testing later.

11           So again, my apologies for not being here earlier,  
12 but ...

13           THE COURT: That is fine. That is fine. I  
14 understand people have lives beyond litigation. But -- okay.  
15 As long as that's your understanding of your obligations  
16 here --

17           MR. DAVIS: Oh, yes.

18           THE COURT: -- in terms of the security of -- and  
19 protocols in this court, it is acceptable. I would not --

20           MR. CROSS: Your Honor?

21           THE COURT: Just a second.

22           I know that Mr. Favorito is a consultant to your  
23 attorney. But he hasn't been authorized to have a phone here.  
24 So I don't -- you understand this is -- what I am authorizing  
25 is for you personally.

1 MR. DAVIS: As a plaintiff, that is correct.

2 THE COURT: As plaintiff. All right.

3 MR. CROSS: If we could get clarity on one thing,  
4 Your Honor. There are multiple people who during the opening  
5 statements saw Mr. Davis seated with a laptop on his lap on the  
6 bench in the well. I'm not sure how that happened. But if we  
7 could get clarity that there has been no recordings made  
8 already of anything.

9 THE COURT: Is that -- have you made any recordings?

10 MR. DAVIS: No.

11 THE COURT: All right. You understand that if you  
12 have made any recordings it would be in violation of the  
13 Court's rules?

14 MR. DAVIS: Yes. I personally don't want to incur  
15 any federal fines.

16 THE COURT: All right. I'm not in the business of  
17 fines. It is really more like, you know, there is a sanction  
18 of some sort that is -- when you don't do this. And I wouldn't  
19 want it to be related to your interest in this case.

20 MR. DAVIS: Thank you.

21 THE COURT: All right.

22 MR. OLES: Judge, there was also the matter of the  
23 proffers. We have three proffers related to testimony --

24 THE COURT: All right. I'm going to let Mr. Davis  
25 sit down at this time.



1 And you can -- Mr. Oles, then you can go ahead.

2 And do we have -- all right. Go ahead.

3 MR. OLES: This is just going to be --

4 THE COURT: Closer to the mic. Thank you.

5 MR. OLES: Are you prepared to receive them now or --

6 THE COURT: Well, I don't even know what they are.

7 MR. OLES: Okay.

8 Previously the Court -- we had asked to present  
9 certain testimony on behalf of some of the witnesses, some of  
10 which the Court allowed. And I did ask at the time -- I know  
11 for sure at least on two of them -- that we be allowed to  
12 proffer into the record on the matter of the testimony that was  
13 excluded that we believe would have been put into the record.

14 So that is all I am asking.

15 THE COURT: Is there any objection to that from any  
16 of the other parties?

17 MR. TYSON: Not from the State, Your Honor.

18 MR. CROSS: No, Your Honor.

19 THE COURT: All right. Go ahead.

20 MR. OLES: Can I get my notes?

21 THE COURT: Yes.

22 MR. OLES: Thank you.

23 Your Honor, I have three proffers. The first is  
24 related to Frances Watson. I will say at the outset I'm not  
25 asking the Court to revisit this at this time. I understand

1 the Court's ruling. I'm merely putting this into the record so  
2 that the record is complete --

3 THE COURT: All right.

4 MR. OLES: -- on appeal.

5 After agreeing that the -- after -- well, the Court  
6 allowed me to present Ricardo Davis to -- allowed me to address  
7 certain -- to address adverse witness Frances Watson only one  
8 question about duplicate ballots and no questions about other  
9 issues.

10 Had I been able to ask Ms. Watson questions that  
11 Mr. Davis believes were within the scope of the trial issues as  
12 defined by the Court in its motion or in its order on summary  
13 judgment back in November, we believe that that testimony from  
14 Ms. Watson would have shown, first, that Ms. Watson was not  
15 truthful originally about her investigative findings that  
16 claimed there were no problems with the Dominion system  
17 re-count.

18 Second, that Ms. Watson was not truthful in claiming  
19 that the Coffee County re-count problems were attributable to  
20 human error and not having batches properly separated.

21 Third, we believe it would have exposed a lack of  
22 corroborating evidence in the record to support any of Frances  
23 Watson's findings about the Coffee County re-count.

24 THE COURT: Any of her findings or funding?

25 MR. OLES: Her -- her findings.

1 THE COURT: Findings. All right. About the  
2 re-count.

3 MR. OLES: Yes. I'm sorry.

4 THE COURT: That is all right.

5 MR. OLES: I'll speak a little clearer.

6 In addition, that Ms. Watson was not -- Ms. Watson  
7 was not truthful about claiming to have found no duplicate  
8 pristine ballots that were accepted in the Fulton County 2020  
9 election.

10 And finally, we believe that we could have  
11 established through her that Mr. Germany was not truthful when  
12 he claimed that Mr. Chaney made false statements about the  
13 Dominion re-count problems and the lack of support from the  
14 Secretary of State's office.

15 With respect to Dr. Philip Stark, the Court did allow  
16 me to present two questions and some limited follow-up on  
17 behalf of my client, Mr. Davis.

18 However, had we been permitted to ask him further  
19 questions, we believe that Dr. Stark would likely have been  
20 able to confirm the following:

21 First, that a digital ballot image is required by the  
22 Dominion voting system to produce tabulated votes for the  
23 ballot.

24 Two, that Dr. Stark believes digital ballot images  
25 are election records that should be retained according to

1 federal and state law.

2 Three, that Dr. Stark is not aware that those ballot  
3 images are retained for either the period of 22 months under  
4 state law or 24 months under federal law consistently.

5 Next, we believe that Dr. Stark would have confirmed  
6 that it is technically impossible to have more certified votes  
7 than ballot images if the election processes are followed  
8 correctly. We believe he would have confirmed that there were  
9 17,852 certified 2020 Fulton County votes that had no original  
10 ballot image files.

11 We believe that he would be able to confirm that  
12 votes that have -- votes with missing ballot images are an  
13 indication of electronic vote tampering.

14 We believe he also would have confirmed that 376,863  
15 original Dominion ballot images for the certified Fulton County  
16 2020 election are missing.

17 And finally, that the missing original ballot images  
18 would have made it impossible to accurately audit the 2020  
19 election.

20 In connection with this proffer, we would ask the  
21 Court to admit into the record what is Docket Number 1346-1 in  
22 the case, which is Dr. Stark's original declaration -- amended  
23 declaration of March 9, 2022, which again we only offer for  
24 purposes of this proffer.

25 Third, Dr. Alex Halderman. We were given -- we were

1 not permitted to ask any questions of Dr. Halderman. However,  
2 had we been -- Mr. Davis been permitted to do so, we believe  
3 that from his testimony Mr. Davis could have established that  
4 Dominion has no available patch that is proven to address all  
5 of the security concerns revealed in his extensive security  
6 analysis upon which he presented in this case.

7 Two, that the irregular remote access that occurred  
8 in Coffee County during the election poses a threat to the  
9 entire Dominion voting system.

10 Three, that intruders could attack and infect either  
11 the ICX BMD or the ICP scanner that reads the QR codes for all  
12 in-person voting.

13 Four, that intruders could also attack and infect the  
14 county election management server and not simply the BMD.

15 Fifth, that both the ICP in-person scanners and the  
16 ICC mail-in ballot scanners cannot detect photocopied ballots.

17 Six, that malware could reside on either the ICX  
18 precinct scanners, the ICC central absentee ballot scanner, or  
19 even the election management server.

20 Seven, we believe Dr. Halderman would have agreed  
21 with Dr. Stark's conclusions that Georgia's audit procedures  
22 are wholly inadequate.

23 Eight, we believe his testimony would have  
24 established that the only way to rule out malware-based fraud  
25 is with hand count results or very comprehensive audits for

1 each race on the ballot.

2 Nine, that all Dominion system components were  
3 developed without sufficient attention to security during  
4 design, software engineering, and testing.

5 Ten, that malware that is spread by an election  
6 management server could also infect other servers.

7 Eleven, that malware could also be programmed to  
8 infect ICP in-person voting scanners and not simply the BMDs.

9 Twelve, that malware could also be programmed to  
10 infect the ICC absentee ballot scanners.

11 Thirteen, Dr. Halderman was not given the opportunity  
12 to examine the server that prepares election projects for the  
13 current or previous Dominion system despite claims by Ryan  
14 Germany's Secretary of State investigative report that he  
15 would.

16 Fourteen, Dr. Halderman would have found similar  
17 security deficiencies in the Dominion servers, election  
18 projects, and other components had he been given that  
19 opportunity to examine them.

20 Finally, fifteen, that Dr. Halderman would have  
21 explained why Paul Maggio was able to image copy every Dominion  
22 voting system component, except the BMD.

23 That concludes our proffer for the record, Judge.

24 THE COURT: Okay. Would you -- if you have a version  
25 that you could file of that in the record, it would probably be

1 helpful. I mean, it will be obviously recorded in the  
2 transcript. But I think if you would make that a written  
3 proffer.

4 MR. OLES: Thank you, Judge. We'll do that.

5 THE COURT: If there is something that you are  
6 referencing there that is not in the record, if you could  
7 attach whatever the documents are.

8 MR. OLES: We will do that, Judge.

9 May I have a day or so to do that?

10 THE COURT: Sure. Sure.

11 MR. OLES: Thank you.

12 MR. BROWN: Your Honor, if I may just say for the  
13 record -- this is apparent to Your Honor, but it may not be  
14 entirely clear -- by not responding to that proffer, of course,  
15 the plaintiffs are not suggesting that there is any merit to  
16 any of that evidence. But instead, that is simply a proffer to  
17 preserve the objection under Rule 103.

18 Thank you, Your Honor.

19 MR. TYSON: And, Your Honor, just so the record is  
20 complete, we would also object to the admission of the  
21 particular report of Dr. Stark that Mr. Oles referenced, if  
22 that becomes necessary.

23 THE COURT: All right.

24 Did you want to add something, Mr. Brown?

25 MR. BROWN: No. I was just going to say he wasn't

1 moving to admit that. He was simply making a proffer. It has  
2 already been rejected.

3 MR. TYSON: And to be clear, Your Honor, I apologize.  
4 We also would object to the proffer obviously that Mr. Oles has  
5 offered.

6 THE COURT: Okay.

7 Well, he has made the proffer he wanted. I have  
8 allowed him to perfect the record from his perspective. And  
9 that's fine.

10 And I don't think you have to go and assemble  
11 everything, actually. I think that you did a very good job in  
12 describing your summary. So you don't have to do anything  
13 further, Mr. Oles.

14 MR. OLES: Thank you, Judge.

15 THE COURT: All right.

16 All right. It is 20 of 1:00. Because I've had a  
17 criminal case matter that has arisen, we're going to just  
18 convene another extra five minutes. So we're talking about a  
19 quarter of 2:00.

20 COURTROOM SECURITY OFFICER: All rise.

21 THE COURT: I'm just finishing something here. So  
22 just go ahead on your way.

23 **(A lunch break was taken.)**

24 THE COURT: Please have a seat.

25 Well, with respect to plaintiffs' motion for adverse



1 inferences that is briefed at Document 1793, I don't know  
2 whether the motion is also at the same docket number. But  
3 assuming it is, this is my thought is that there are some  
4 reasonable factual inferences that the Court can draw from the  
5 testimony that has been given, even with or without  
6 consideration of the witnesses' invocation of the Fifth  
7 Amendment.

8           And some of the inferences that plaintiffs suggest  
9 are reasonable ones. At least there is enough evidence in the  
10 depositions to support them. And I will look at them -- at the  
11 testimony again in that light.

12           But I think to ask me to wholesale determine that --  
13 make a wholesale determination with respect to the testimony  
14 offered by each of these witnesses mentioned in Doc 1793 that  
15 they -- that I can make the factual findings suggested by the  
16 testimony as an adverse inference as a matter of -- basically,  
17 a matter of law is going too far.

18           I think that the defendants are entitled -- and they  
19 haven't presented their case -- to present relevant evidence  
20 that might or might not clarify, refute, or mitigate the  
21 testimony given or -- and the cross-examination of their  
22 witnesses can also elicit information that would be relevant to  
23 the Court's making adverse inferences, not as a matter of law,  
24 but based on the evidence presented.

25           And all counsel in this case, I believe, understand

1 that my focus in this case has always been evidence and facts.  
2 I think it puts the Court's findings in a more vulnerable  
3 position for me to make a judgment as a matter of law that each  
4 of the adverse inferences suggested here are established. And  
5 because of the Fifth Amendment invocation and the circumstances  
6 of the testimony, I think, as I said, some of these findings  
7 are sort of almost clear from the record, such as Ms. Latham  
8 was in DC staying at the Willard Hotel. I don't need a -- to  
9 draw an adverse inference to get to that point anyway. There  
10 are others as well.

11 And so I'm going to deny the motion for adverse  
12 inferences and proceed based on the evidence actually  
13 presented.

14 MR. CROSS: Your Honor, could I add one quick thing?

15 Understanding you're denying the motion, you're not  
16 going to draw an inference, the one thing that I would just add  
17 to also support the Fifth Amendment invocations being in the  
18 record, in the *Coquina* case that has gotten a lot of  
19 discussion, the Court cites to an Eighth Circuit case. It is  
20 *Cerro*, C-E-R-R-O, *Gordo Charity*, and it's 819 F.2d 1471 at  
21 1482.

22 And what the *Coquina* case points out on reliance on  
23 that is that the Fifth Amendment invocations also provide -- it  
24 informs the finder of fact why the parties with the burden of  
25 proof resorted to less direct and more circumstantial evidence

1 than the witnesses' own account of what had occurred.

2 And so the only point being made -- we understand  
3 Your Honor's ruling. There won't be adverse inferences. But  
4 to the extent the State argues there are certain things we  
5 didn't prove up that these witnesses could testify to, we would  
6 say Your Honor could look at the adverse -- or sorry, could  
7 look at the invocation as a reason why we weren't able to  
8 develop certain things, and so that is the only other point.

9 THE COURT: All right. I mean, that is fair. I will  
10 look at the Eighth Circuit case. I think I would do that  
11 anyway as well because it is obvious sometimes from the way the  
12 invocation has proceeded that that is true.

13 And I guess I'm a little -- I'm hoping that my law  
14 clerks got this, and I'm not -- and I didn't get it right. But  
15 I'm a little confused about the State's position that -- I have  
16 to rule on their -- their motion as to exclusion of  
17 Dr. Halderman's testimony as a condition of their proceeding in  
18 their case.

19 Maybe I misunderstood that, and that is why I am  
20 asking.

21 MR. TYSON: Your Honor, I'm happy --

22 THE COURT: On our 4:00 hearing. Because I said, why  
23 are we -- why are you saying I can't -- that we're going to now  
24 suddenly do it earlier?

25 MR. TYSON: So, Your Honor, a couple of things. I

1 think, number one, we at least were under the impression that  
2 the 4:00 discussion related to Mr. Cross' email from Sunday and  
3 the allegations that were contained in it --

4 THE COURT: Okay.

5 MR. TYSON: -- not specifically for Dr. Halderman and  
6 his testimony.

7 THE COURT: Okay.

8 MR. TYSON: But we have gone back and looked at  
9 lunch. We don't see why there is any reason to hold up  
10 plaintiffs resting or how that would affect the merits of their  
11 case at this point.

12 I'm happy to be corrected on that. But from our  
13 perspective, we don't see there is a connection between the  
14 close of their evidence and what we're going to talk about at  
15 4:00. But we can proceed however you would like to. If we  
16 need to do that now before they close, we can do that. If we  
17 need to approach it some other way, that is our view on that.

18 THE COURT: Okay. Well, I think you were -- in any  
19 event, you wanted to raise -- you wanted to do something before  
20 the close of evidence, and I think that is fine what you are  
21 suggesting. But I look to plaintiffs' counsel to address that.

22 MR. CROSS: As to how this bears on the merits? Is  
23 that the question?

24 THE COURT: No. I mean, basically, what defense  
25 counsel said was that they had talked about the issue of -- did

1 what they needed in order for you to close, and they decided  
2 after consultation, as I understand it, that they thought they  
3 could preserve their motion properly without having testimony  
4 first on your -- your concerns regarding Mr. Persinger's --

5 MR. CROSS: And we agree with that.

6 THE COURT: -- exam. So therefore, I felt like we  
7 are fine.

8 MR. CROSS: Yes.

9 THE COURT: And so that is the question.

10 Do you feel comfortable in closing at this point,  
11 though you are going to be clarifying issues regarding  
12 Mr. Persinger --

13 MR. CROSS: Yes.

14 THE COURT: -- later in the afternoon?

15 MR. CROSS: Yes. My understanding is they are going  
16 to go ahead and call their first witness. We'll deal with  
17 Mr. Persinger at 4:00. They are preserving their Rule 52  
18 objection despite calling the witness, is my understanding, and  
19 so nothing is getting waived.

20 MR. TYSON: So, Your Honor, Mr. Brown and I had a  
21 discussion. I said I would go back and talk to my team about  
22 that.

23 From our perspective, we went back and looked. We  
24 don't see how the issues from Mr. Cross' email on Sunday have  
25 anything to do with whether they can close their case. I think

1 our original proposal was, do that later because of that.

2 So our view is they can rest now. We can move 52(c)  
3 now. And then after that is concluded, we can call our first  
4 witness. We don't see a reason to get out of order at this  
5 point.

6 THE COURT: All right.

7 MR. CROSS: Right. So on that, Your Honor, while I  
8 appreciate Mr. Tyson's view, it is our decision on when we  
9 rest. And Rule 52(c) is clear on its face. Your Honor cannot  
10 hear a Rule 52 motion and rule on it until we are fully heard.  
11 That is the language. And so we will not have been fully heard  
12 on the evidence in our case until we have resolved the  
13 Persinger issue, and I can explain that briefly.

14 We will show later -- we have begun to lay out, but  
15 we will show later that what has transpired coming out of this  
16 inspection is that Mr. Persinger has shown himself to be --

17 THE COURT: All right. No, I'm not going to hear it  
18 in public.

19 MR. CROSS: This goes to the merits, Your Honor.

20 THE COURT: I'm sorry. I'm not going to hear it  
21 right now because that is what you wanted to raise. We're  
22 going to discuss it whenever we discuss it.

23 MR. CROSS: Understood.

24 THE COURT: And some of it may end up being  
25 completely in another hearing as well, but I am -- I feel

1     like --

2                 MR. CROSS:   Understood.

3                 THE COURT:   -- I do not want -- I mean, I don't want  
4     you saying things that I would say would not be proper for the  
5     public record until I have heard them at least once.

6                 MR. CROSS:   Understood.

7                 Let me say it this way:   The inspection itself has  
8     created a risk for future elections.

9                 THE COURT:   All right.   I just want you to --

10                MR. TYSON:   No.   No.

11                THE COURT:   -- I want you to stop at this juncture.

12                You don't need to be saying any of this for purposes  
13     of my having a hearing, which I have already said I'll have on  
14     your concerns, so no.   I mean, we can have the hearing -- if it  
15     is your view as opposed now to the State's view that you need  
16     to have this in the record before you close, then we'll just --  
17     we'll -- you know, as soon as -- we can do that now.   I mean,  
18     that is fine.

19                MR. CROSS:   The only reason I was saying anything was  
20     there was --

21                THE COURT:   Just --

22                MR. CROSS:   -- to explain the merits connection.

23                THE COURT:   You don't have to describe it at this  
24     point.

25                MR. CROSS:   Understood.

1 THE COURT: You can describe it when it is all --  
2 we're through. But we --

3 MR. CROSS: So do we want to do Persinger now and  
4 then -- or how do you want to --

5 MR. TYSON: Your Honor, I think if Mr. Cross is  
6 taking the position that the resolution of the issues related  
7 to Mr. Persinger are part of their merits case, I think we have  
8 to deal with it before they rest.

9 Our view is that it is not a part of the merits case,  
10 but that apparently is theirs.

11 THE COURT: If there is a dispute about it, then I --  
12 all right.

13 And are we going to deal with any of the Dr. --  
14 Mr. Persinger's reporting issues at this same time?

15 Let me just put it that way.

16 MR. TYSON: I think that is part of the allegations  
17 in the email, Your Honor.

18 THE COURT: Okay. Then there are some other things I  
19 want to talk to you about too.

20 Let's do it. The decider in chief is there. I  
21 really have a great group to work with me. It is a pleasure.  
22 I know all of you depend on your colleagues, but it is a real  
23 pleasure and saving grace that I have such great people who  
24 work with me. And I want to thank them because they have also  
25 been working day and night, and I think no one harder than



1 Shannon.

2           Okay. All right. Ladies and gentlemen, I'm very  
3 sorry to be disruptive of the experience of sitting in the  
4 hearing. But because there were a number of highly  
5 confidential data-related issues that came up, I'm going to  
6 have to close this hearing to anyone but identified counsel  
7 who -- and we'll have to go over that as well. I don't know  
8 how long this will take. It could take half an hour; it could  
9 take more. I don't know.

10           But we'll continue -- and your first witness, again,  
11 is?

12           MR. TYSON: Our first --

13           THE COURT: Ryan Germany, or has that changed?

14           MR. TYSON: No. That is still the case, Your Honor.  
15 Mr. Germany.

16           THE COURT: So I think we will get to Ryan Germany,  
17 but -- so if you want to hang out, please feel free to do so.  
18 I would appreciate if you would not sit -- get too close to the  
19 doorway, though, because that can be distracting. So there is  
20 a lot of room on the other side closer to the ceremonial  
21 courtroom also. Thank you.

22                   **(The public proceedings were thereby adjourned**  
23                   **at 2:11 PM when the Court heard sealed**  
24                   **proceedings, and then the public proceedings**  
25                   **continued at 3:43 PM, as follows:)**

1 MR. CROSS: Yes, Your Honor. On behalf of plaintiffs  
2 Donna Curling, Donna Price, Jeffrey Schoenberg, we rest our  
3 case at this time. Obviously, we reserve the right for  
4 rebuttal.

5 MR. MCGUIRE: And, Your Honor, on behalf of  
6 plaintiffs, the Coalition for Good Governance, Laura Digges,  
7 William Digges III, and Megan Missett, we rest -- the Coalition  
8 plaintiffs rest their case as well.

9 MR. OLES: On behalf of Mr. Davis, he rests his case.

10 MR. TYSON: Your Honor, at this time, the defendants  
11 would move for a motion -- move for judgment on partial  
12 findings under Rule 52(c) of the Federal Rules and are ready to  
13 be heard on that.

14 THE COURT: Go ahead and proceed.

15 MR. TYSON: Mr. Martin, if we can let Mr. Montgomery  
16 have screen control.

17 And, Your Honor, if I may approach, I have copies of  
18 the presentation.

19 Your Honor, as I know you are aware, under Rule 52(c)  
20 once a party has been fully heard on an issue, like the posture  
21 of the case now at the end of the plaintiffs' case, you can  
22 enter a judgment against them on the grounds that controlling  
23 law would require that. At this stage, you are now able to  
24 weigh credibility, weigh the evidence. There is no requirement  
25 of deferring to the nonmoving party in terms of the view of the

1 evidence.

2 And so we would submit that there are at least two  
3 bases. We'll discuss those for our motion. One is  
4 jurisdiction and standing. I'll just touch on those briefly.  
5 The other is the merits of the Anderson-Burdick claims that are  
6 currently pending before the Court.

7 First of all, just briefly on traceability, what we  
8 have heard from the plaintiffs in terms of their potential  
9 injuries is that they don't -- they are concerned about voting  
10 an absentee ballot because they -- concerned they may not  
11 receive that in time. As both a matter of law and as a matter  
12 of fact, as the plaintiffs have testified, they -- those  
13 ballots and applications are handled by counties, not by the  
14 State. So as a result, there is no traceability for any  
15 injuries related to absentee ballots.

16 For injuries related to ballot-marking devices, this  
17 Court has discussed and the plaintiffs referenced the idea of:  
18 They don't know what the scanner is interpreting in terms of  
19 their votes that are being cast, and they have asserted a right  
20 to know that their votes are cast as counted.

21 What this Court has heard from their testimony is  
22 that those plaintiffs also don't know what a scanner is  
23 counting for their hand-marked paper ballots. They believe and  
24 have more faith in a hand-marked paper ballot than they do in a  
25 ballot-marking device ballot, but they don't have the ability

1 to confirm that that hand-marked ballot will remedy their  
2 injury.

3 Plaintiffs also agree that there were risks involved  
4 with hand-marked paper ballots and those ballots not being  
5 scanned properly by a scanner. So in terms of injury, Your  
6 Honor, we would submit that the plaintiffs have not shown a  
7 cognizable injury under Article III.

8 In terms of their claims, again, we are proceeding,  
9 as everyone is aware, under an Anderson-Burdick claim, which  
10 means the plaintiffs at this point in the case have to identify  
11 what the burden on the right to vote is so that then this Court  
12 can weigh the State interests related to the imposition of that  
13 burden.

14 In terms of the burdens that the plaintiffs have  
15 presented to you, this Court talked about in its summary  
16 judgment order the plaintiffs' right to cast an effective  
17 accurately counted vote, and you discussed whether they can  
18 present evidence of an actual or imminent threat to their right  
19 to have their votes counted as cast.

20 At the conclusion of the evidence here, Your Honor,  
21 we would submit that the plaintiffs have not shown an actual or  
22 imminent threat. In fact, as their experts -- multiple of  
23 their experts indicated in the letter they signed after the  
24 November 2020 election, the existence of technical flaws is not  
25 enough; it is simply speculation.

1           So we would submit that at this point, the only  
2 evidence the plaintiffs have submitted to you regarding a  
3 burden on the right to vote is speculative. It is not actual  
4 and imminent as this Court required in its summary judgment  
5 order.

6           Plaintiffs were also given multiple opportunities  
7 during the course of this case to connect the various  
8 complaints they had about the administration of elections.  
9 They were not able to connect those to one particular element.  
10 And as we talked about at the beginning, this is a situation  
11 where there must be a burden on the right to vote, not merely a  
12 burden as a result of normal things that happen in the course  
13 of an election.

14           In addition to the speculation in terms of the  
15 burden, the plaintiffs have presented you no evidence of  
16 compromise of an election. Everyone has agreed on that. They  
17 presented to you no evidence of compromise of the registration  
18 system. They presented no evidence of malware on Coffee County  
19 election equipment. They have agreed that all voting systems  
20 face cybersecurity risks, and neither Dr. Halderman nor  
21 Mr. Skoglund was able to quantify any of those risks. They  
22 could talk about degrees, but they couldn't tell you exactly  
23 what the change was in terms of the risk.

24           And as this Court -- or actually, Judge Jones in the  
25 Fair Fight case, when looking at Dr. Halderman's testimony,

1 talked about the importance of quantifying the likelihood of  
2 whether the system was or will be hacked. And the plaintiffs  
3 have provided you now with no evidence of what that actually  
4 means.

5 The other evidence they presented is State inaction,  
6 that there is something that happened and the State didn't  
7 respond sufficiently. This is very similar to a claim brought  
8 by President Trump's campaign before the November 2020 election  
9 in Pennsylvania. The allegation there was that Pennsylvania  
10 had not done enough to secure its elections against voter  
11 fraud.

12 The district court noted it was an unusual claim  
13 under Anderson-Burdick. We raised at the beginning of this  
14 case that this was an unusual case under Anderson-Burdick  
15 because it is not about what the State did, it is about what  
16 the State allegedly did not do. And as that Court in  
17 Pennsylvania said, it is much less natural for a Court to  
18 evaluate whether the Government had a good reason for not doing  
19 something differently or for failing to do more to prevent or  
20 reduce the risk of misconduct by third parties that could  
21 burden the right to vote.

22 What the plaintiffs have given you here is limited  
23 evidence about State inaction. Ms. Watson and Mr. Blanchard  
24 both testified that a business card from Cyber Ninjas was not  
25 enough to place anyone on notice, or at least them, a potential

1 access to the system.

2 When the State did receive notice after the phone  
3 call between Ms. Marks and Mr. Hall was played, it looked at  
4 the server. There is testimony to that. The GBI has the  
5 investigation, and at least two guilty pleas have resulted so  
6 far.

7 The evidence also shows the equipment was replaced,  
8 again with no indication of malware or compromise. As we  
9 raised earlier, the Coffee County breach was an intervening  
10 criminal act, and in terms of injury, none of the plaintiffs  
11 live in Coffee County.

12 Another area that shows the lack of a burden is the  
13 lack of a remedy the Court can order. All systems require some  
14 degree of trust. All have risks. At least some voters would  
15 continue using ballot-marking devices under the plaintiffs'  
16 theory, as Dr. Stark discussed yesterday.

17 What you have heard in testimony is getting rid of QR  
18 codes would not address the plaintiffs' claims. Doing more  
19 audits would not address the plaintiffs' claims. Doing more  
20 logic and accuracy testing would not address the plaintiffs'  
21 claims. Adding additional cybersecurity measures would not  
22 address the plaintiffs' claims.

23 The evidence before the Court shows that any problems  
24 with BMDs were the result of human error, not machine  
25 malfunctions. And ultimately, Your Honor, this is not just a

1 class action as to all voters; it must be something that would  
2 address the plaintiffs' alleged burdens.

3 And to the point, if there are, we get to the State  
4 interest piece, assuming you find a burden. You have before  
5 you Dr. Halderman's discussion of the advantages of  
6 ballot-marking devices over hand-marked paper ballots, the  
7 disability access issues Mr. Skoglund talked about.  
8 Mr. Sterling explained the procurement process, the reasons for  
9 selecting Dominion. No bidders participated who did not have a  
10 QR code option. And you have heard testimony that the State  
11 has taken action on the CISA recommendations by implementing a  
12 write-once, read-many approach for election projects and  
13 implemented parallel monitoring.

14 So, Your Honor, we would submit that at this point in  
15 the case, based on all of the evidence the plaintiffs have  
16 offered, they have not shown a burden on the right to vote  
17 through the use of ballot-marking devices and -- especially not  
18 a severe burden. And to the extent they have, the State  
19 interests clearly outweigh any burden on the right to vote.  
20 Thank you.

21 THE COURT: Thank you.

22 Would you share a copy of your PowerPoint with  
23 Mr. Martin? And he will distribute it to us.

24 MR. TYSON: Yes, Your Honor. I provided three copies  
25 and also to the plaintiffs.



1 THE COURT: Thank you.

2 COURTROOM DEPUTY CLERK: There's two of them over  
3 here.

4 MR. FISHER: Good afternoon, Your Honor.

5 THE COURT: Good afternoon.

6 MR. FISHER: Your Honor, I want to start by directing  
7 the Court to what Judge Jones did in Fair Fight. Same motion  
8 was brought. The Court deferred judgment on it until the close  
9 of all the evidence. You should do the same thing here.  
10 There's still evidence coming in that bears on the issues in  
11 this case through the State's case, and the right thing to do  
12 is wait until you have all that evidence before making a  
13 ruling.

14 But if the Court is inclined to consider this motion  
15 now, it should deny it. And I want to respond to the three  
16 points that Mr. Tyson brought up.

17 First, on standing, the State ignores two critical  
18 points on standing, Your Honor. First, it ignores the one  
19 plaintiff rule. This Court already decided the one plaintiff  
20 rule applies in this case in summary judgment based on the  
21 Coalition's organizational standing, and it also ignores that  
22 the Court already determined that the concern about having  
23 confidence that a ballot will be counted as cast is a  
24 cognizable injury under Article III. That is at Docket 705,  
25 Pages 85 through 86.

1           The Court already determined that this is a  
2       cognizable injury under Article III, and that is exactly what  
3       you heard each of the individual plaintiffs testify about in  
4       that case. You heard Donna Curling testify about it, Donna  
5       Price testify about it, and Jeff Schoenberg testify about it.  
6       They all said that they lack confidence that the current system  
7       will allow them to cast a ballot that they have confidence --  
8       reasonable confidence will be counted as cast. So that is  
9       standing.

10           On the merits, Your Honor, you know, the case --  
11       their case really boils down to the argument that this is a  
12       speculative injury, that it is not actual and imminent, that it  
13       is speculative, it is not realistic. Well, we saw  
14       Dr. Halderman in open court hack a BMD voting and caused it to  
15       change votes with nothing but a pen. That is it. Just a pen.  
16       And he testified that it wasn't just him. He taught Jeff  
17       Schoenberg how to hack a BMD to change votes in less time than  
18       it takes to actually cast a vote.

19           And we didn't see a single shred of evidence in  
20       Dr. Halderman's cross challenge any of the vulnerabilities that  
21       he's identified explaining why this machine is so easy to hack.  
22       Instead, during his cross, we heard what we heard today. There  
23       is no evidence of any altered outcome. There is no evidence of  
24       any malware. There is no evidence of any hacked elections.

25           Well, to borrow a phrase from my colleague,

1 Mr. Brown, that might all be interesting, but it is entirely  
2 unresponsive to our claims. Our claims are not about past  
3 elections. They are not about outcomes. They are about the  
4 potential for votes to be changed in future elections. And  
5 what was demonstrated in court, what you saw with your own eyes  
6 with a ballpoint pen is that anybody can walk into a voting  
7 booth and hack a BMD and cause it to do just that.

8 I want to just read to the Court what Dr. Halderman  
9 said. What keeps me up at night is what if someone -- what if  
10 some fanatics on the internet, you know, recruit a few dozen  
11 people to go around a state like Georgia on election day and  
12 program BMDs even in a simple way that will really visibly swap  
13 votes. It would be chaos, and it would take tremendous work to  
14 figure out the full scope of that chaos. We would have to go  
15 around and inspect every single BMD to determine if something  
16 was wrong, and you probably couldn't know for sure, even with  
17 careful inspection, how many BMDs have actually been affected.

18 That takes us directly to Coffee County. The  
19 evidence about the breach in Coffee County is undisputed in  
20 this case, Your Honor. You saw photos of it. You saw videos  
21 of it. SullivanStrickler, Doug Logan, Jeffrey Lenberg, Alex  
22 Cruce, all of them, gaining access to nearly every piece of  
23 election equipment in the Coffee County elections office,  
24 imaging it, and then putting it on the internet.

25 Uncontrolled distribution. That is the term that

1 Kevin Skoglund applied to this. You know, Merritt Beaver, I'll  
2 remind the Court, he testified at his deposition that the  
3 software for the EMS server is a roadmap for bad actors. He  
4 testified here that it is a piece of a roadmap for bad actors.  
5 Frankly, it doesn't matter. The point is that either a piece  
6 of a roadmap or a roadmap for bad actors who have an interest  
7 in changing votes in Georgia is an uncontrolled distribution on  
8 the internet.

9 We are beyond the threshold of whether or not the  
10 threat to the plaintiffs' right to have their vote counted as  
11 cast is speculative or we're beyond that threshold. We're  
12 beyond the threshold of whether the State should do something  
13 about that threat. The evidence plainly shows that there is an  
14 actual and imminent threat to that right.

15 On the point about State inaction, let's just review  
16 what the evidence says and what the evidence has shown about  
17 the State's control over voting equipment.

18 Well, we know they own it. Gabriel Sterling  
19 testified about that. We know that only the SEB can grant  
20 access to election equipment. Gabriel Sterling testified about  
21 that too. We know that only the State can determine and make  
22 the decision to step away from the current electronic voting  
23 system and force counties to use paper ballots. That decision  
24 can only come from the State.

25 And we know that county election officials, like

1 those we saw in the deposition videos from Coffee County, rely  
2 on the State when it comes to cybersecurity and investigations  
3 into issues about relating to election equipment.

4 We also know that the State has failed to properly  
5 investigate those issues. We saw this in a number of different  
6 instances.

7 Just to give the Court a snapshot, with respect to  
8 Fortalice, Merritt Beaver testified that he didn't even review  
9 the assessment from Fortalice in 2019 that was supposed to  
10 include an assessment of how easy it was to hack a BMD. Didn't  
11 even review it. Kicked it over to Dominion. And he testified  
12 in 2020 he asked Fortalice to stop providing written reports  
13 because they were taken out of context by the public.

14 We saw it again with CISA. Dr. Halderman testified  
15 that there is no evidence that Georgia has changed any of its  
16 practices to diligently implement the mitigations that were  
17 recommended by CISA.

18 And, of course, we saw with Coffee County -- we heard  
19 a lot of testimony about the investigation in Coffee County,  
20 but one point sticks out. Joshua Blanchard, no one in his  
21 office -- no one ever actively investigated the Coffee County  
22 breaches.

23 On relief, Your Honor, again, this issue has already  
24 been decided. The Court at summary judgment held that it could  
25 order remedial measures without invading the legislature.

1 That's Docket 1705 at 102. Nothing has changed here today.  
2 But I'll note that enjoining the BMDs here in Georgia under the  
3 conditions of which they are implemented -- which, by the way,  
4 is the only thing that plaintiffs are seeking. We're not  
5 seeking an injunction against BMDs everywhere, just here in  
6 Georgia under the conditions in which they are currently  
7 implemented.

8 That would not encroach on the legislature. There is  
9 already a law existing in Georgia that if the electronic method  
10 of voting is rendered impossible or impractical, paper ballots  
11 should be used. The Court enjoining the use of BMDs would not  
12 encroach on the legislature.

13 Finally, on State interests, it is a balancing test.  
14 You have to weigh it. We didn't hear any evidence of any of  
15 the State witnesses about what interests could possibly justify  
16 the use of BMDs. They could have asked witnesses from the  
17 Secretary of State's questions about that. They didn't. They  
18 didn't ask a single witness a question about that. The only  
19 witness who did testify about State interests articulated the  
20 exact sort of generalized regulatory interests that this Court  
21 decided on summary judgment might not be sufficient to justify  
22 the use of BMDs even if the burden is slight.

23 The burden is not slight here. It is severe. And  
24 for that reason, the balancing test favors enjoining BMDs.

25 Thank you, Your Honor.

1 THE COURT: Mr. McGuire?

2 MR. MCGUIRE: Thank you, Your Honor.

3 For the Coalition Plaintiffs, I just wanted to add a  
4 couple of points on top of what Mr. Fisher said.

5 So at the beginning of our opening, I told you we  
6 were going to talk about evidence that fell into four buckets.  
7 The first one was injury -- was standing, and then the  
8 Anderson-Burdick test with the burden and the State interest,  
9 and finally, relief.

10 Standing is essentially established here because  
11 Mr. Tyson didn't even attempt to challenge the organizational  
12 standing of the organizational plaintiff here, Coalition for  
13 Good Governance.

14 The only evidence in the record shows that Coalition  
15 has diverted resources away from activities that it would do to  
16 opposing the State's required use of BMDs, and that diversion  
17 of resources gives the Coalition for Good Governance  
18 organizational standing, which, in turn, under the one  
19 plaintiff rule, extends to remaining plaintiffs.

20 In addition, as for the individual plaintiffs, it is  
21 important to emphasize that we have made this point in the  
22 past. Standing is distinct from the merits. So the injury  
23 that can give you standing doesn't even have to be illegal  
24 conduct. It just has to be something that is an identifiable  
25 trifle that infringes on legally protected interests that you

1 are entitled to observe.

2           So just to take one example from the testimony that  
3 is not contradicted, the requirement that you cast a vote on a  
4 BMD where your vote is encoded in a QR code that you cannot  
5 read, that infringes on a legally protected interest because  
6 you certainly have an interest in knowing what votes you are  
7 casting. And if you cast a BMD ballot into a scanner -- and  
8 that is when your vote is cast is when you cast it into the  
9 scanner, not when you print it.

10           When you cast it into the scanner, you cannot know  
11 for sure the votes that you are casting, and that informational  
12 injury is an infringement on a legally cognizable interest for  
13 the individuals.

14           Turning to the Anderson-Burdick --

15           THE COURT: Let me just ask you one question.

16           Just -- obviously, there was a great deal of  
17 presentation in the summary judgment motion regarding Coalition  
18 standing and maybe a lot less during trial.

19           So are you standing on what you presented in the  
20 summary judgment motion, or is there something in particular  
21 you want me to focus on here?

22           MR. MCGUIRE: As far as the organization standing?

23           THE COURT: Right.

24           MR. MCGUIRE: Well, Rhonda Martin's testimony really,  
25 we believe, kind of rolled up what was in the summary judgment



1 motion.

2 THE COURT: All right.

3 MR. McGUIRE: As far as the Anderson-Burdick test,  
4 you have the burden side and you have the State interest side.

5 On the burden side, because standing and the merits  
6 are distinct, we have argued in this case that the Court is  
7 entitled to look at a larger -- to take a larger view of the  
8 burden on voting than the kind of particularized injuries that  
9 would give someone standing as an individual to come to court  
10 and invoke the jurisdiction of the Court.

11 So the point of Article III in the case of a  
12 controversy requirement is you have to have a stake in the  
13 outcome of the litigation, and that is why -- that is why the  
14 injury-in-fact requirement has to be satisfied. But once you  
15 satisfy that and you have a stake in the outcome of the  
16 litigation, then the Court is entitled to look at the merits of  
17 the lawsuit. And the merits can consider harms that are larger  
18 than the particularized injury. As long as the relief that you  
19 are seeking addresses both, the particularized injury and the  
20 harms that make you right on the merits, they don't have to be  
21 the same. They are distinct.

22 And in this case, we have shown evidence that proves  
23 that people who vote on BMDs are more likely to cast an  
24 ineffective vote than people who vote by other means. They are  
25 treated differently. They have -- it violates the Equal

1 Protection Clause. Their fundamental right to vote is burdened  
2 by the fact that their vote is less likely to be effective, in  
3 part because of the insecurity of the system, and for the  
4 various other reasons that we have shown in the evidence.

5 On the flip side, the other side of that balancing is  
6 the State interests, and the evidence that you heard, both from  
7 Mr. Sterling and from Mr. Mashburn, is that the State does not  
8 have an interest in forcing voters to use BMDs for in-person  
9 voting. At best, they have an interest they allege in  
10 following the law.

11 But the Court is entitled to weigh that interest, and  
12 that interest should be -- the weight of that asserted interest  
13 should be discounted by the fact that the State picks and  
14 chooses which laws it decides to follow in making people use  
15 these machines.

16 So the State interest does not -- under the evidence  
17 in front of the Court right now certainly does not outweigh the  
18 burdens on the voters.

19 And finally, for the relief prong, enjoining the  
20 required use of BMDs as the standard method for in-person  
21 voting will solve both the standing injuries and the burden on  
22 voting that weighs on the merits. And so because we've  
23 established evidence that shows all of these things, and  
24 because the State has not put on any evidence to contradict it,  
25 we believe you should deny the Rule 52 motion. Thank you.

1 THE COURT: Thank you.

2 Anything you wanted to say, Mr. Oles?

3 MR. OLES: Not at this time, Judge. My client adopts  
4 the arguments of the co-plaintiffs at this point in the case.

5 THE COURT: Thank you.

6 MR. OLES: If it is appropriate, we would request a  
7 little bit of time -- to the extent that we have now a  
8 difference in standing as a matter of his separation from the  
9 parties, we would request a little bit of time to address that,  
10 but that would be all. Thank you.

11 THE COURT: Well, I think -- discuss the one  
12 plaintiff rule because I think your client probably is still  
13 covered by that. So discuss it with -- you can discuss it with  
14 your co-counsel, or you can look -- go back and read my order  
15 on the motion for summary judgment.

16 MR. OLES: All right. We will, Judge.

17 THE COURT: Okay. All right. Well, I'm going to  
18 defer ruling on the motion until the conclusion of trial and my  
19 review of all of the evidence after that. It is too complex  
20 and weighty of a set of issues for me not to hear everything  
21 when there really still are live disputes that -- as indicated  
22 by the evidence I have heard.

23 So would the State like to call its first witness?

24 **THE DEFENDANTS' CASE.**

25 MR. BEDARD: Yes, Your Honor. The State calls Ryan

1 Germany.

2 (There was a brief pause in the proceedings.)

3 THE COURT: He's lost. He said Groundhog Day is not  
4 for me.

5 MR. BEDARD: As we know, he has never been here  
6 before.

7 (There was a brief pause in the proceedings.)

8 COURTROOM DEPUTY CLERK: Please raise your right  
9 hand.

10 (Witness sworn)

11 COURTROOM DEPUTY CLERK: Please, once again, if you  
12 would, state your name and spell your name for the record.

13 THE WITNESS: My name is Ryan Germany, R-Y-A-N,  
14 Germany, like the country, G-E-R-M-A-N-Y.

15 Whereupon,

16 RYAN GERMANY,

17 after having been first duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. BEDARD:

20 Q. Good morning, Mr. Germany. You have obviously testified  
21 in the plaintiffs' case, so I want to just cover a few things  
22 real quick just to remind the Court.

23 You used to work for the Secretary of State's office;  
24 correct?

25 A. Yes.

1 Q. Your title when you worked there was general counsel?

2 A. Yes.

3 Q. When did you first begin working at the Secretary's  
4 office?

5 A. January 2014.

6 Q. Who was the Secretary when you were hired?

7 A. Secretary Kemp.

8 Q. And who was the Secretary when you left the Secretary's  
9 office?

10 A. Secretary Raffensperger.

11 Q. So fair to say --

12 THE COURT: Remind me which date when you were  
13 working under Governor Kemp and when he was --

14 THE WITNESS: I was hired -- I started, as I said, in  
15 January 2014, so I was with him until -- then Secretary  
16 Raffensperger was -- took office in January 2019. And then, of  
17 course, for a few months there was Secretary Crittenden. I  
18 worked for her as well.

19 BY MR. BEDARD:

20 Q. So to state the obvious, you worked over multiple  
21 administrations; right?

22 A. Yes.

23 Q. Okay. Have you ever heard of the SAFE Commission?

24 A. Yes.

25 Q. What was the SAFE Commission?

1     **A.**     The SAFE Commission was something that then-Secretary Kemp  
2     put in place. It stands for the Secure Accessible and Fair  
3     Elections Commission. We put that in place in the Secretary of  
4     State's office following the 2018 General Assembly general  
5     session. So it was about probably springtime 2018 we put that  
6     in place.

7     **Q.**     And what was the task of the SAFE Commission?

8     **A.**     So the SAFE Commission -- so at that point, there had been  
9     both in that legislative session in 2018 and in previous  
10    ones -- certainly, the one before that in 2017, I believe, even  
11    in 2016, there were discussions about moving to a new voting  
12    system. The previous DRE voting system was getting old, and we  
13    knew that there would have to be a replacement.

14            So the Secretary of State's office put in -- stood up the  
15    SAFE Commission really to try to bring together different  
16    stakeholders in the election process.

17            Particularly with Georgia voting system, different  
18    stakeholders were going to have -- they were going to have  
19    things to do with that voting system, and we just wanted to  
20    make sure that their voice was heard, that they could bring  
21    their expertise here from other experts, and then make a  
22    recommendation to the General Assembly.

23    **Q.**     Did you have any role with the SAFE Commission?

24    **A.**     Yes.

25    **Q.**     What was your role in regards to the SAFE Commission?

1     **A.**     So my role was basically helping with all the  
2     administrative tasks. The SAFE Commission didn't have any  
3     staff. So I helped set up meetings, and I helped get material  
4     that they considered from the different voting system vendors.  
5     I did an initial draft of the final report. I think I did a  
6     presentation to them on Georgia procurement law just to give  
7     them a sense of what that process was like.

8     **Q.**     You mentioned a report.

9             Did the SAFE Commission produce a final report?

10    **A.**     Yes.

11    **Q.**     Okay.

12             MR. BEDARD: May I approach, Your Honor?

13             THE COURT: Yes.

14    BY MR. BEDARD:

15    **Q.**     Mr. Germany, have you seen this document before?

16    **A.**     Yes.

17    **Q.**     Is this a true and correct copy of the SAFE Commission  
18    report?

19    **A.**     Yes. The only thing I would add is that I believe the  
20    report included some appendices.

21    **Q.**     You jumped the gun on me. I'll go ahead and move to this  
22    next one.

23             MR. BEDARD: Your Honor, may I approach again?

24             THE COURT: Yes.

25

1 BY MR. BEDARD:

2 Q. Mr. Germany, have you seen this document before?

3 A. Yes.

4 Q. Are these the appendices you were just referring to?

5 A. Yes. Appears to be.

6 Q. Okay. Are both of these documents publicly accessible on  
7 the Secretary of State's website?

8 A. Yes.

9 Q. And have you seen them recently on the Secretary's  
10 website?

11 A. Yes.

12 Q. When did you most recently see them?

13 A. I believe it was Sunday.

14 Q. Okay.

15 A. This past Sunday.

16 MR. BEDARD: At this point, Your Honor, we would move  
17 to admit Defendants' Exhibits 856 and 1224 into evidence.

18 THE COURT: Any objections?

19 MR. CROSS: One second, Your Honor.

20 **(There was a brief pause in the proceedings.)**

21 MR. CROSS: No objection, Your Honor.

22 THE COURT: It is admitted.

23 BY MR. BEDARD:

24 Q. All right. Let's talk about the commission again.

25 You mentioned that the SAFE Commission was kind of tasked



1 with exploring options for a new voting system for Georgia.

2 Why -- from your perspective, what is the benefit of  
3 establishing a commission like the SAFE Commission to study an  
4 issue like this?

5 **A.** Well, I think there's a few benefits. One, the  
6 legislative session is usually pretty crowded with issues.  
7 Again, the session only lasts from January until the end of  
8 March, beginning of April, and so there might not be a lot of  
9 time to consider things, especially things that have kind of a  
10 technical element.

11 So we wanted to -- with this commission, we thought we  
12 could -- it did include legislators, of course. So it kind of  
13 enlarges the time they can consider something.

14 We also wanted to make sure that the voices that really  
15 have a stake in the election system, particularly local  
16 election officials -- that they have their expertise provided  
17 to and then hopefully listened to.

18 And, you know, a lot of times in the session, the people  
19 that the legislature hears from the most are kind of the  
20 loudest or just the most activist. And so we really wanted to  
21 make sure that local election officials in particular had a --  
22 an option to let their -- at least some of their voices be  
23 heard.

24 **Q.** You don't have to kind of go through everybody's name, but  
25 relatively speaking, how many members, give or take, were on

1 the SAFE Commission?

2 **A.** I believe it was kind of between 15 and 18. I know we had  
3 some -- the Secretary of State was a member, and then we had  
4 some -- the decision of whatever new voting system Georgia went  
5 to was going to be up to the legislature. So we had members of  
6 the legislature from both the House and the Senate, and then  
7 from both parties and the House and the Senate. And then we  
8 had local election officials as part of it, and we wanted to  
9 have a cross-section of -- we had rural. I think we had a  
10 probate judge from a rural county, and we had some election  
11 officials from more populated counties as well.

12 We had representatives from -- or at least people that had  
13 experience with the different political parties, and we had a  
14 disability expert and a cybersecurity expert, and then we had a  
15 couple of voters at-large.

16 **Q.** Why -- well, scratch that.

17 I think you just testified to this.

18 Was the SAFE Commission tasked with actually choosing  
19 Georgia's next election system?

20 **A.** No.

21 **Q.** What was its purpose?

22 **A.** Their purpose was to hear evidence, use their expertise,  
23 and then hear additional expertise, and then make a report and  
24 recommendation to the General Assembly.

25 **Q.** All right. So you said they are providing recommendations

1 to the legislature.

2 Who made the final decision on what type of voting system  
3 to adopt for Georgia?

4 **A.** The legislature.

5 **Q.** In providing its recommendations and evaluating this  
6 evidence, what factors did the SAFE Commission look at?

7 **A.** They looked at a lot of different factors, and I think  
8 that was a big reason why we wanted to have a commission  
9 particularly of people who have experience running elections in  
10 Georgia because there is a lot of different factors that go  
11 into it.

12 But, of course, cybersecurity was a factor. Accessibility  
13 was a factor for disabled voters in particular, but also just  
14 accessibility overall, ease of use and kind of just a general  
15 operation of it. It has got to be able to be operated.

16 Election officials have to be able to do this. They have to  
17 train poll workers who are, you know, essentially volunteers.

18 So there's -- think about how you store it, and there's  
19 just a lot of different aspects, and we wanted people to look  
20 at -- who had that expertise and could look at each aspect of  
21 running an election.

22 MR. BEDARD: Jim, can we pull up --

23 THE COURT: Yeah. Could you just hold one second.

24 Just before you ask -- let me ask you a question. I  
25 may have just missed it.

1 Did you have a specific role in shepherding the SAFE  
2 Commission?

3 I might have missed that.

4 THE WITNESS: I didn't have an assigned role or  
5 anything. It was just sort of duties that fell to me in my  
6 capacity as general counsel to the Secretary of State's office.

7 THE COURT: And if you wouldn't mind, I don't want to  
8 take this over, but I just want to make sure I understand what  
9 the foundation of his testimony is and what the  
10 responsibilities you had were.

11 MR. BEDARD: Sure. I don't think -- I believe this  
12 is all in the record so far. I think Mr. Germany has already  
13 testified to this. He effectively served as staff for the SAFE  
14 Commission because there was no staff, so he did an initial  
15 draft of the final report, and he assisted in kind of the  
16 administrative side for the SAFE Commission.

17 THE COURT: Did you attend all of their hearings?

18 THE WITNESS: I believe I did, yes.

19 THE COURT: Go ahead.

20 MR. BEDARD: Jim, can we pull up 856, please. Can we  
21 go to Page 3, and can we highlight kind of the bottom paragraph  
22 there?

23 BY MR. BEDARD:

24 Q. You see here, this is the SAFE Commission report which you  
25 just testified to.

1           It says here, SAFE Commission's mission is to thoroughly  
2   study and discuss all options for Georgia's next voting system  
3   with a focus on security transparency, voter experience,  
4   accessibility and inclusion, voters' ability to adjust to a new  
5   system, and the ability of election officials to adapt to a new  
6   system quickly and accurately.

7           Do you see that?

8   **A.**   Yes.

9   **Q.**   Does that reflect kind of your understanding of the  
10  various factors the SAFE Commission was considering during  
11  their deliberations?

12 **A.**   Yes. I think that -- I think all those were considered,  
13 and probably even additional ones, just because it is hard to  
14 list all of them.

15 **Q.**   Let's see. Were there any limitations placed on the types  
16 of systems that the SAFE Commission could look at that you are  
17 aware of?

18 **A.**   Well, we worked with voting -- the voting system  
19 vendors -- the different vendors to get information on the  
20 systems that were available, so I guess the limitations were  
21 just what systems were actually available in the market.

22 **Q.**   Is that a practical limitation on the SAFE Commission's --  
23 on the scope of systems that the SAFE Commission could look at?

24 **A.**   Well, this was something -- you know, we envisioned the  
25 General Assembly doing something quickly or in the next

1 session, which is what ended up happening. It had to be  
2 looking at what is actually available on the market.

3 **Q.** And maybe let me ask my question a different way.

4 In setting up the SAFE Commission, did the Secretary's  
5 office or any other kind of entity put any limitations on the  
6 types of systems that the SAFE Commission could look at?

7 **A.** No.

8 **Q.** Did the SAFE Commission consider hand-marked paper  
9 ballots?

10 **A.** Yes.

11 **Q.** And did it consider ballot-marking devices?

12 **A.** Yes.

13 **Q.** Did it consider any other types of systems, to your  
14 knowledge?

15 **A.** I would say it considered kind of a hybrid of those -- of  
16 those two options as well.

17 **Q.** All right. Was the SAFE Commission the first attempt in  
18 Georgia at studying the new voting system?

19 **A.** I know there had been hearings in previous legislative  
20 sessions regarding moving to a new voting system.

21 **Q.** If you look at the -- on Page 3 of the SAFE Commission  
22 report where it is titled Background, does that appear to you,  
23 to your understanding, an accurate depiction of kind of the  
24 background leading to the SAFE Commission?

25 **A.** Yes.

1 Q. Okay. How did the SAFE Commission do its work?

2 A. So what the SAFE Commission did was it had public meetings  
3 and it -- we had different people come in who hopefully had  
4 some expertise in certain aspects of voting. So I know one of  
5 the initial things we did was I worked with the voting system  
6 vendors to get information regarding their available systems,  
7 like documentary information. So we got that and shared that  
8 with the SAFE Commission.

9 We also set up a demonstration by the voting system  
10 vendors of the different types of equipment and systems. And  
11 my recollection is they were all very cooperative with the  
12 process and participated, the vendors and the commission  
13 members.

14 And then we had public meetings where we had different  
15 members of the SAFE Commission -- for instance, we had a  
16 disability expert on the commission, and she moderated a  
17 discussion with other disability experts so the commission  
18 could hear their -- their thoughts and then also engage in a  
19 discussion with them.

20 We had a similar process with cybersecurity. We had an  
21 expert on the panel or -- on the commission, and he moderated a  
22 discussion with other experts, other cybersecurity experts.  
23 And we did a similar thing for voting rights, and we had people  
24 who, you know, generally are on different sides of election  
25 litigation come in and talk about, you know, what they see.

1           And then we provided -- Secretary of State staff provided  
2     information, I believe, about audits or other things that might  
3     be of interest.

4           And then, of course, the commission is allowed -- or was  
5     able to engage and ask questions, and then those meetings  
6     included public comment as well where the public could make  
7     their views known.

8     **Q.**     Were you at all of those meetings?

9           I think you already testified in response to the judge's  
10    question.

11   **A.**     I believe I was at all of them.

12   **Q.**     Were those meetings transcribed in any way?

13   **A.**     Yes.

14   **Q.**     How were they transcribed?

15   **A.**     We had a court reporter present at each one.

16   **Q.**     Let's talk about one of those meetings.

17           MR. BEDARD: Your Honor, may I --

18   BY MR. BEDARD:

19   **Q.**     Let me ask you this first.

20           Did the commission meet in August of 2018?

21   **A.**     I don't recall the exact date, but that sounds right.

22   **Q.**     Did it meet in, I think, around Augusta around that time?

23   **A.**     We had a meeting in Columbia County, I remember.

24   **Q.**     Were you there?

25   **A.**     Yes.



1 Q. And was that meeting transcribed as well?

2 A. Yes.

3 MR. BEDARD: Okay. Your Honor, may I approach?

4 THE COURT: Yes.

5 MR. BEDARD: These ones are going to be big.

6 BY MR. BEDARD:

7 Q. Mr. Germany, have you seen the document in front of you  
8 before?

9 I know it is a lot of paper.

10 A. Yes.

11 Q. What is the document in front of you?

12 A. This looks like a transcription of the SAFE Commission  
13 meeting that took place on August 30, 2018, in Columbia County.

14 Q. Is this transcript available online publicly anywhere?

15 A. Yes, it is available at the Secretary of State's website.

16 Q. Have you seen it there recently?

17 A. Yes.

18 MR. BEDARD: And at this point, Your Honor, I think  
19 we would move 1222 -- Defendants' Exhibit 1222 into evidence.

20 MR. CROSS: Your Honor, we object to this as hearsay.  
21 It is a massive document with lots of people talking. I'm also  
22 not sure what the relevance is.

23 MR. BEDARD: I think I can shortcut the hearsay  
24 objection. We're not offering it for the truth of whatever  
25 anybody is testifying to in here. It goes towards what is the

1 information available to the SAFE Commission.

2 THE COURT: I'm sorry. It goes to?

3 MR. BEDARD: The information that was presented to  
4 the SAFE Commission in making their recommendations, and I  
5 believe -- well, I'll leave it there for now because I think  
6 that answers the hearsay objection unless -- is that the only  
7 objection to that as well?

8 MR. CROSS: Well, and relevance.

9 MR. BEDARD: So to relevance, plaintiffs have already  
10 put in Dr. Lee's presentation to the SAFE Commission. I  
11 believe you already heard either testimony or throughout this  
12 case allegations against that the State didn't listen to,  
13 quote-unquote, its own cybersecurity expert.

14 So they have put the SAFE Commission and the evidence  
15 that was in front of the SAFE Commission at issue in this case,  
16 and I think talking about some of the other things that were  
17 also in front of the SAFE Commission is also relevant. I  
18 won't --

19 THE COURT: How many meetings were there?

20 BY MR. BEDARD:

21 **Q.** How many meetings were there, Mr. Germany?

22 **A.** I want to say there were four or five.

23 THE COURT: And were the materials presented to the  
24 commission in the process of that?

25 I mean, I know Dr. Lee presented something because we

1 saw it at another hearing.

2 THE WITNESS: Yes. Yes, there was different  
3 materials presented at -- at different meetings, and then I  
4 think the documentation provided by the voting system vendors  
5 was also presented -- or maybe not presented, but sort of given  
6 to the SAFE Commission members.

7 THE COURT: And how many members were there on this  
8 commission?

9 THE WITNESS: I can't recall exactly. Kind of  
10 15-to-18-type of range.

11 THE COURT: Well, I'm going admit it for its -- I'm  
12 not sure how relevant it is, but it may be relevant, and there  
13 may be parts that they want to rely on. It is not harmful, in  
14 any event.

15 MR. BEDARD: Certainly, Your Honor. I think to the  
16 extent it is not helpful, I would, I suppose, say the same  
17 thing about Mr. Lee's presentation, so --

18 THE COURT: Yes. I understand.

19 BY MR. BEDARD:

20 Q. Let's go through --

21 MR. BEDARD: I think it is also relevant in some  
22 other areas that I think will become clear.

23 BY MR. BEDARD:

24 Q. In this meeting, did the SAFE Commission hear testimony  
25 from the disability community?

1 MR. CROSS: I'm sorry. Which meeting?

2 MR. BEDARD: The August 30, 2018, meeting that we're  
3 referring to.

4 MR. CROSS: I thought this was multiple meetings.  
5 This is only one meeting?

6 MR. BEDARD: This is one.

7 THE COURT: Oh, I thought it was multiple.

8 MR. BEDARD: No, it is not all of them. This is just  
9 the August meeting, Your Honor.

10 THE COURT: It is just which meeting?

11 MR. BEDARD: The August 2018 meeting.

12 THE COURT: And that dealt with disability issues  
13 or --

14 MR. BEDARD: There were a variety of issues  
15 discussed. But one of the issues I want to discuss right now  
16 is the disability panel.

17 THE COURT: All right.

18 BY MR. BEDARD:

19 Q. So, Mr. Germany, I believe the question was: In this  
20 meeting, did the SAFE Commission hear from the disability  
21 community?

22 A. Yes.

23 Q. Who is on -- or in what forum did it hear from the  
24 disability community?

25 A. So we had a disability expert as a member of the

1 commission, and then she moderated a discussion where other  
2 experts in the disability community came in and talked to the  
3 commission about their concerns and desires regarding different  
4 voting systems.

5 **Q.** Who is on that disability panel? Do you recall?

6 **A.** I don't recall.

7 **Q.** All right. Let's go to -- if you flip to Page 84 in your  
8 transcript.

9 MR. CROSS: Sorry. What page?

10 MR. BEDARD: 84.

11 BY MR. BEDARD:

12 **Q.** Do you want to flip through Pages 84 -- well, let me ask  
13 you this: Would reviewing the transcript refresh your  
14 recollection as to who was on that panel?

15 **A.** Yes.

16 **Q.** Okay. If you want to flip through Pages 84 through about  
17 87, just briefly.

18 **A.** Amy Howell was the disability expert on the SAFE  
19 Commission who moderated the panel. I think she is with the  
20 State Department of Behavioral Health and Developmental  
21 Disabilities.

22 It looks like the other panelists were Lou Ann Blake who,  
23 at least at the time, was the deputy director of the National  
24 Federation of the Blind and the Jernigan Institute and served  
25 as a manager of the National Federation of the Blind's HAVA

1 Training and Technical Assistance Grant for the United States  
2 Department of Health and Human Services.

3 I won't read the whole thing. Anne Kuhns was also on the  
4 panel. She was -- Kuhns is K-U-H-N-S. She was with the staff  
5 attorney with the Georgia Advocacy Office. And then Elizabeth  
6 Jones was a director and COO of the Shiloh Community Center  
7 that provides health and wellness services to senior citizens  
8 and persons with disabilities.

9 Q. Okay. Were you there when they presented?

10 A. Yes.

11 Q. What concerns from the disability community did they  
12 convey to the SAFE Commission?

13 MR. BROWN: Your Honor, I would object on two  
14 grounds. First, that's explicitly asking for hearsay for the  
15 truth of the matter asserted, first.

16 Second, it is irrelevant because we are not objecting  
17 for the use of BMDs for those with disabilities.

18 MR. BEDARD: Well, I think, Your Honor, when we get  
19 into testimony, you'll see that some of the concerns that they  
20 expressed go towards the unique use of BMDs for disabled voters  
21 as opposed to the rest of the voting community.

22 MR. BROWN: That is the lawyer testifying, and --

23 MR. BEDARD: Well, I wasn't able to ask the question  
24 because of the objection, so --

25 MR. BROWN: If it were from one of the participants,

1 it would be rank hearsay.

2 MR. BEDARD: Again, Your Honor, it is not about the  
3 truth of the matter. It is about what is the information --

4 THE COURT: All right. Well, ask what the concern  
5 was, but I don't -- it is true that the plaintiffs have never  
6 objected to it, the use of BMDs for -- to address the  
7 accommodation needs of anyone who is disabled who desires to  
8 use it.

9 MR. BEDARD: I think we can address that concern here  
10 in just a couple of questions, Your Honor.

11 BY MR. BEDARD:

12 **Q.** What concerns did they raise to the commission,  
13 Mr. Germany?

14 **A.** So I recall that one of the main concerns from the  
15 disability community was the -- the idea of disabled people  
16 having to vote on different equipment than the nondisabled  
17 voters.

18 I recall that was a topic that I think went across all of  
19 the disability experts that they had concerns about.

20 MR. CROSS: Your Honor, one additional objection to  
21 this. We've heard a number of times that these folks were  
22 considered disability experts, so it is also back-dooring  
23 expert testimony. They had an opportunity to identify and  
24 present an expert on these issues, and now we have no one who  
25 can respond.

1 MR. BEDARD: First off, Your Honor, I think I would  
2 respond and say that we made a similar objection to  
3 Ms. Nakamura during her testimony testifying as to things that  
4 she observed in her work, and I believe Your Honor ruled that  
5 she could at least testify to what she had heard and to her  
6 work in that space.

7 I think Mr. Germany is here. It is relevant. Again,  
8 it goes towards the information that the SAFE Commission had in  
9 front of it when it made a recommendation to the legislature  
10 about what system to approve. It is again not being admitted  
11 for the truth of the matter, but I also think it goes towards  
12 the State interests that are being considered here.

13 Mr. Germany, also based on a question I will be  
14 asking here a bit -- I expect him to testify these are concerns  
15 as well.

16 MR. BROWN: Objection, Your Honor.

17 THE COURT: Don't say what you expect him to testify  
18 about.

19 MR. BEDARD: Well, I wasn't going to say, you know --

20 THE COURT: All right. Well, who were you -- who was  
21 testifying to you that -- I mean, are we talking about citizens  
22 or are you talking about experts who say they want the same  
23 system no matter what?

24 That is what you were referring to when we suddenly  
25 veered into expert testimony.



1 THE WITNESS: I was talking about the people that I  
2 mentioned on this disability panel that presented to the SAFE  
3 Commission.

4 THE COURT: All right.

5 BY MR. BEDARD:

6 Q. Let's go to --

7 MR. CROSS: Sorry, Your Honor. Could we just get  
8 clarity? Because he referred to them as experts. If they are  
9 not suggesting these people are experts, then I'll withdraw the  
10 objection.

11 THE COURT: Who was -- how many people on the panel,  
12 if you recall, and who was an expert in terms of qualifications  
13 and experience, not by virtue of their own personal experience?

14 THE WITNESS: So the people on the panel, again, it  
15 was moderated by Amy Howell. She was a member of the SAFE  
16 Commission. She was with the Department of Behavioral Health  
17 and Developmental Disabilities. The other panelists were Lou  
18 Ann Blake, deputy director of the National Federation of the  
19 Blind and the Jernigan Institute where she had worked since  
20 2005. And for eight years, Ms. Blake had served as the manager  
21 of the National Federation of the Blind, other HAVA training,  
22 the Help America Vote Act training, and the Technical  
23 Assistance Grant for the United States Department of Health and  
24 Human Services.

25 And it says she was responsible for working -- I'm

1 reading from the transcript -- for working with election  
2 technology developers, voting rights advocates, election  
3 officials to ensure that the voting process is accessible to  
4 blind voters.

5 It goes on to say she's published a number of  
6 scholarly --

7 THE COURT: I don't need to hear every part of her  
8 qualifications. I'm just trying to find out how many people  
9 were on it and how many were experts by these sorts of  
10 qualifications.

11 THE WITNESS: So she was the first one. There was  
12 three -- it was the people I mentioned earlier.

13 The next one was Anne Kuhns who was a staff attorney  
14 with the Georgia Advocacy Office. They are the nonprofit,  
15 federally mandated entity who advocate on behalf of individuals  
16 with disabilities.

17 MR. CROSS: Your Honor, I might be able to make this  
18 easier.

19 If the State is not going to take the position in our  
20 case that any of the people who spoke are experts under the  
21 Rule of 702, they are not offering any of these people as  
22 experts, then I don't think we need to walk through it. That's  
23 fine. So I think it is really a question of the State.

24 MR. BEDARD: Again, Your Honor, we're not asking you  
25 to rely on their opinion as expert testimony. What I think it

1 goes towards is, again, because when we had this objection  
2 during the plaintiffs' case in chief, we didn't think the  
3 selection of the machines and all that -- and I think during  
4 the pretrial conference as well was particularly relevant. We  
5 lost on that objection. The plaintiffs put up Dr. Lee's  
6 presentation, other issues about the selection of machines. I  
7 think we're entitled to then respond, and what other  
8 information was in front of the SAFE Commission and the  
9 legislature --

10 THE COURT: All right. That's fine. You have done  
11 that. So why don't you move on at this point.

12 MR. BEDARD: Right. I think if we can establish what  
13 the concerns were that were raised --

14 THE COURT: I think he --

15 MR. BEDARD: -- by those experts.

16 THE COURT: But go ahead.

17 MR. BEDARD: Thank you.

18 BY MR. BEDARD:

19 **Q.** I believe, Mr. Germany, you testified that there was  
20 concern that disabled voters be able to use the same system as  
21 everyone else.

22 Do you recall what the reasons were they were saying why  
23 that was important to the disabled community?

24 **A.** Well, in a lot of jurisdictions -- first of all, every  
25 polling place is required to have one -- at least one

1 ballot-marking device or DRE or accessible-type voting machine.

2 In a lot of jurisdictions not in Georgia, that is the only  
3 ballot-marking device or DRE that is in the -- that is in that  
4 polling place, so everyone else would be voting, for instance,  
5 on hand-marked paper.

6 In that situation, I know there's a lot of things that  
7 come up where maybe the poll workers aren't very well-trained  
8 on that equipment. Sometimes it is not even set up because it  
9 is used infrequently. And then there is also issues with the  
10 ballot that comes from a ballot-marking device or a DRE looks  
11 different.

12 And so there was concerns raised that -- I think, in this  
13 panel that that -- it goes to voter privacy concerns where that  
14 is the -- if there is only one voter using that machine in a  
15 precinct, then it is easy to identify if you look at a ballot  
16 image, for instance, who that voter is.

17 And the other thing that I would say is -- and I think  
18 this came up in the panel also. In Georgia previously, we --  
19 every voter used the same equipment. Every voter used the  
20 DREs, disabled or nondisabled.

21 MR. BROWN: Your Honor, I would object. I don't know  
22 if he's recounting what happened in the hearing in Columbus or  
23 if he is simply arguing a point on behalf of the State  
24 defendants.

25 MR. BEDARD: I think --

1 THE COURT: I think you could move through this a lot  
2 quicker, frankly. I think it is fine to indicate that there  
3 were concerns about being as accommodating as possible in  
4 addressing the concerns of the disability community. I don't  
5 know that we have to do much more than that.

6 If this was a paramount deciding factor, then maybe  
7 we do, but I haven't heard that in anything I have ever -- that  
8 the State has ever presented, that it was the paramount  
9 determining factor in the selection of the equipment.

10 MR. BEDARD: I think what Mr. Germany testified to,  
11 Your Honor, is that the SAFE Commission is considering a  
12 variety of factors in coming to their recommendation. This is  
13 an important one.

14 THE COURT: That is fine.

15 MR. BEDARD: I'm not saying it is the paramount one,  
16 so that is what we were trying to establish and what exactly  
17 that concern was that was raised to them from that community.

18 But I hear you, Your Honor.

19 THE WITNESS: Too is a lot of the factors compete.  
20 So, you know, you can't have one paramount because they compete  
21 with each other.

22 THE COURT: I understand that, but there's -- you  
23 know, you weigh what you think is important, and this is  
24 obviously an important factor. I deal with lots of disability  
25 issues. I have, throughout my legal career, dealt with them.

1 I understand that.

2 But I'm just saying in terms of the -- maybe the SAFE  
3 Commission actually made a finding about it, for all I know. I  
4 don't know that. I only have what your summary is. And I  
5 don't doubt it was a factor.

6 The question -- and there is nothing -- and I realize  
7 there were a lot of considerations. I mean, I think you've  
8 covered it. But if there is something more that you think is  
9 really significant, go for it. I don't mean to be stepping on  
10 your presentation such that it will -- if it is going to -- you  
11 think there's something a lot more significant than what I have  
12 heard, fine.

13 MR. BEDARD: I'll try and move along. I think I can  
14 point the Court because the transcript is already in evidence  
15 to Pages 90 through 92 or so as to where those -- the exact  
16 verbatim concerns that were raised.

17 BY MR. BEDARD:

18 **Q.** Beyond the disability community and the concerns that they  
19 raised in the SAFE Commission, Mr. Germany, you mentioned,  
20 what -- was the preexisting system in Georgia?

21 **A.** Before this system, we had a DRE system in Georgia.

22 **Q.** And on that system, did disabled voters vote in the same  
23 manner as nondisabled voters?

24 **A.** Yes. On the same equipment.

25 **Q.** How long had that system been in place in Georgia?

1     **A.**     That system was in place from 2002 until this current  
2     system was put in place in 2020.

3     **Q.**     So as the general counsel for the Secretary's office, did  
4     you have any concerns about moving to a hand-marked paper  
5     ballot in light of that history and context?

6     **A.**     Moving from a system where all voters voted on the same  
7     equipment to one where disabled voters had to vote on different  
8     equipment, yes, I was concerned that would have been seen as  
9     moving backwards, basically, and I think that could have opened  
10    up potential litigation or other kind of legal issues.

11    **Q.**     Okay. Moving on from --

12             THE COURT: Okay. Let me ask you a question.

13             Did you consider or did the commission consider  
14    having an optional -- an option that you could vote on --  
15    anyone could vote, including disabled voters on this  
16    machinery --

17             THE WITNESS: I know --

18             THE COURT: -- but that it wasn't a mandate as the  
19    only option?

20             THE WITNESS: I know one of the things that they  
21    considered was a hybrid model. I think what they considered as  
22    hybrid more so was ballot-marking devices for early voting  
23    because of some of the unique challenges with early voting  
24    given the way that you can vote at any early voting location in  
25    your county.

1 I don't know if they considered directly kind of an  
2 either/or approach for any voter.

3 THE COURT: Well, we just have heard testimony that  
4 there are locations around the country, states and cities  
5 that -- as well as counties that basically give -- allow people  
6 to decide how they want to vote. I mean, they come in, they  
7 could be disabled voters, they could be nondisabled voters, and  
8 they can decide if they want to do that or if they want to do a  
9 hand ballot and do it right there.

10 Did you-all consider that -- not you, but the  
11 commission? Do you remember?

12 THE WITNESS: I know they considered a hybrid model  
13 of both types. I don't know if they specifically considered --  
14 considered that.

15 THE COURT: Okay.

16 THE WITNESS: I can't recall, I should say.

17 THE COURT: All right.

18 BY MR. BEDARD:

19 **Q.** I'll move on, Mr. Germany.

20 You've mentioned that local officials were also on the  
21 SAFE Commission.

22 What specific concerns did the local officials raise to  
23 the commission?

24 **A.** One thing local election officials raised was that -- the  
25 issue of early voting in Georgia. Early voting is very popular



1 in Georgia, but it is unique because you can go vote at any  
2 early voting location in your county as opposed to on election  
3 day you have to go to your assigned precinct.

4 So that means that early voting locations have to have the  
5 option of providing every single different possible ballot  
6 combination in the county to any voter that shows up, and they  
7 don't -- they don't really know, you know, which voter is going  
8 to show up where in early voting.

9 And then they also raised in -- on election day in  
10 Georgia, because we had a DRE-based system previously, our  
11 precincts had kind of developed in a way where there is a lot  
12 of different ballot combinations in a precinct, especially in a  
13 lot of counties, especially in Fulton County.

14 There are some counties that only have one precinct for  
15 the entire county. I think that is something that has  
16 developed -- that developed really because of the DRE-based  
17 system where it was easy to pull up any ballot combination on  
18 any machine.

19 Of course, with hand-marked ballots, you don't really have  
20 that. You usually have one ballot style per precinct. But in  
21 Georgia we have -- I think it is the majority of voters now  
22 voting early in person where they can vote at any location in  
23 the county. And in the more populous counties like Fulton,  
24 there is a lot of early voting locations. But then they have  
25 some of those same issues on election day where they are going

1 to have -- I think Georgia somewhat uniquely has a lot of  
2 different ballot combinations in precincts even on election  
3 day.

4 And I guess the concern they raised is when you have that,  
5 if you have hand-marked paper, you kind of raise the risk of  
6 poll workers maybe not giving the voter the correct ballot.  
7 You wouldn't have that risk as much in a polling place where  
8 there is only one available ballot combination.

9 Q. Okay. I want to move on just briefly.

10 Are you familiar with Marilyn Marks?

11 A. Yes.

12 Q. And who is Ms. Marks?

13 A. She is -- she is one, I guess, executive director or kind  
14 of the head of one of the plaintiffs in this case, and she has  
15 been involved in Georgia advocating for hand-marked paper  
16 ballots. And I think she was in other states prior to Georgia  
17 advocating for hand-marked paper ballots.

18 Q. Did she appear in front of the SAFE Commission?

19 A. Yes.

20 Q. And did she advocate for hand-marked paper ballots at the  
21 SAFE Commission?

22 A. Yes.

23 Q. Back to the county officials real quick -- well, I'll  
24 scrap that for now.

25 The final meeting, when was the final meeting of the SAFE

1 Commission?

2 **A.** To my recollection, it was early January 2019. We wanted  
3 to have a report, you know, prior to or at the very beginning  
4 of the legislative session in 2019.

5 **Q.** And what did it do at that hearing?

6 **A.** What did the SAFE Commission do?

7 **Q.** Yes.

8 **A.** We went through the initial draft report that I had  
9 drafted, and they made different suggestions and discussions,  
10 and they had different votes on edits and things like that.

11 **Q.** Did they make any amendments to the report during that  
12 meeting?

13 **A.** Yes.

14 **Q.** Are you familiar with Dr. Wenke Lee?

15 **A.** Yes.

16 **Q.** Was he on the SAFE commission?

17 **A.** Yes.

18 **Q.** Did he propose any changes to the final report?

19 **A.** Yes.

20 **Q.** Did the SAFE Commission accept any of those changes?

21 **A.** Yes.

22 **Q.** Did they accept all of those changes?

23 **A.** No.

24 **Q.** At the end of the day -- well, let me back up real quick.

25 Did the SAFE Commission in its final report consider the

1 views expressed to it from the disability community?

2 MR. CROSS: Your Honor, the only thing he can testify  
3 to is his own personal knowledge. He can't speak to what any  
4 individual member of the SAFE Commission considered or not. He  
5 can talk about what was presented to them, but that's as far as  
6 he can go.

7 MR. BEDARD: Let me rephrase.

8 BY MR. BEDARD:

9 Q. In its final report, did the SAFE Commission's final  
10 report incorporate the concerns raised by the disability  
11 community?

12 A. Yes.

13 Q. Did it incorporate the concerns raised by local officials?

14 A. Yes.

15 Q. Did it incorporate cybersecurity concerns raised by  
16 Dr. Lee and others?

17 A. Yes.

18 Q. What was the -- if you can recall, what was the final vote  
19 from the SAFE Commission on the final report?

20 A. What was the --

21 Q. Let me ask you this: You testified previously it was  
22 about 15 to 18 members on the SAFE Commission.

23 When it came time for the final vote on the  
24 recommendations on the final SAFE Commission report, how many  
25 members voted against it that you recall?

1     **A.**    I think by the end of it, the co-chair, Secretary  
2     Crittenden, and she had added Secretary Raffensperger --  
3     Secretary Raffensperger at the time, just because of his  
4     election -- so I think we had 18 members at that time, and I  
5     think three people voted against adoption of the final report.

6     **Q.**    Okay.  So out of the final meeting, from what you can  
7     recall, only three members voted against it?

8     **A.**    Yes.

9     **Q.**    Okay.  Those that voted against it, did they have the  
10    opportunity to express their views?

11    **A.**    Yes.

12    **Q.**    How did they express their views?

13    **A.**    So in the appendices to the report that we also included  
14    to the General Assembly, there is a minority report.

15    **Q.**    And were those views also conveyed to the legislature?

16    **A.**    Yes.

17    **Q.**    Was everything within the appendices conveyed to the  
18    legislature?

19    **A.**    Yes.

20    **Q.**    Okay.  And the final report was also conveyed to the  
21    legislature?

22    **A.**    Yes.

23    **Q.**    Okay.  On one brief topic, just a couple of questions,  
24    Mr. Germany.

25           As general counsel, were you involved in this litigation?

1     **A.**     Yes.

2     **Q.**     Are you familiar with --

3                 MR. BEDARD:   And, Your Honor, before I ask this  
4     question, I just want to be clear this is not going to get into  
5     anything that has been the subject of any sealed proceedings in  
6     this case, which I'm not even aware of.   So I just wanted to  
7     preface that.

8     BY MR. BEDARD:

9     **Q.**     Are you familiar with Jim Persinger?

10    **A.**     I know his name.

11    **Q.**     Okay.   In what capacity are you familiar with  
12    Mr. Persinger?

13    **A.**     I know he was hired as a consulting expert in this case.

14    **Q.**     Do you recall roughly when he was hired?

15    **A.**     I believe he was hired -- my recollection was refreshed  
16    when I testified previously -- in kind of the spring, May,  
17    abouts, 2021.

18    **Q.**     If you can recall, what was he hired to do?

19    **A.**     He was hired to do kind of a forensic image or forensic --  
20    some type of expert kind of work regarding the KSU server.

21    **Q.**     I'm sorry.

22                 You said the KSU server?

23    **A.**     Yes.

24    **Q.**     Did his engagement have anything to do with Coffee County  
25    at the time he was engaged?

1     **A.**     No, not initially.

2                     MR. BEDARD:  I'll reserve for redirect, Your Honor.

3                                     CROSS-EXAMINATION

4     BY MR. CROSS:

5     **Q.**     Good afternoon, Mr. Germany.

6     **A.**     Good afternoon.

7     **Q.**     You mentioned that one of the things that was discussed  
8     with the SAFE Commission, you referred to it as a hybrid of  
9     hand-marked paper ballots and BMDs.

10                    What was that?

11    **A.**     My recollection was there was discussion about -- because  
12    of some of those concerns about early voting in particular  
13    where you can -- you can go anywhere in your county and get --  
14    have to have -- every location has to have every potential  
15    ballot style available, that they thought about, what if we did  
16    BMDs for early voting and hand-marked paper for election day?

17    **Q.**     And why was that not adopted as a recommendation?

18                    MR. BEDARD:  I would again just object reflecting  
19    Mr. Cross' objection as to him not being able to speak into the  
20    mind of any SAFE Commission member.

21                    MR. CROSS:  I'll withdraw that.

22    BY MR. CROSS:

23    **Q.**     Mr. Germany, if you would, grab Exhibit 1224, the  
24    appendices to the SAFE Commission report.

25    **A.**     Yes, sir.

1 Q. And if you flip to maybe ten or so pages in, you'll see  
2 there is a PowerPoint presentation, Cybersecurity  
3 Considerations for Voting Systems.

4 THE COURT: Is the report in here, or is this just  
5 the hearing?

6 MR. CROSS: 1224 --

7 THE COURT: Is it separate?

8 MR. CROSS: The appendices are separate from the  
9 report. The report was a different exhibit. It was  
10 Exhibit 858 -- 856.

11 MR. BEDARD: That's correct, Your Honor. They are  
12 technically separate PDFs --

13 THE COURT: 858?

14 MR. CROSS: 856 looks to be the report, and then the  
15 appendices to that report were admitted as Exhibit 1224.

16 THE COURT: So what is 1222 then?

17 MR. BEDARD: 1222 is the transcript from, I believe,  
18 August 2018.

19 THE COURT: From one hearing?

20 MR. BEDARD: Yes, Your Honor.

21 **(There was a brief pause in the proceedings.)**

22 BY MR. CROSS:

23 Q. So, Mr. Germany, do you have Dr. Wenke Lee's PowerPoint  
24 presentation in front of you?

25 A. Yes.



1 Q. And Dr. Wenke Lee served as a member of the SAFE  
2 Commission; right?

3 A. Yes.

4 Q. I think you mentioned him earlier.

5 In fact, he was the only cybersecurity expert on the  
6 commission; correct?

7 A. Yes. I would agree with that.

8 Q. Do you recall he was handpicked by then-Secretary of State  
9 Brian Kemp who is now the Governor?

10 A. I don't know if I would agree with that characterization.

11 Q. You disagree that the Secretary of State asked Dr. Lee to  
12 serve on this commission?

13 A. I don't recall if it was Secretary of State or the  
14 Secretary of State's office. My recollection is we reached out  
15 to Georgia Tech and said, hey, do you guys have any  
16 recommendations for someone who would be good on this?

17 And they recommended Dr. Lee.

18 Q. Fair to say that something as important as who was going  
19 to be the only cybersecurity expert on the SAFE Commission, if  
20 Secretary Kemp thought you had the wrong guy, he would have let  
21 people know; right?

22 A. I don't think it was like that. I think it was we wanted  
23 someone with a cybersecurity expertise. We reached out to  
24 Georgia Tech. They recommended Dr. Lee. He was -- he agreed  
25 to serve, which is a big part of it. It is a volunteer thing.

1 And he participated, and then his views were his views.  
2 And we wanted them to be, you know, shared with everyone on the  
3 commission.

4 **Q.** Mr. Germany, you have devoted almost the entirety of your  
5 testimony today to talking about the SAFE Commission; right?

6 **A.** I have just been answering the questions that I've been  
7 asked.

8 **Q.** Right. And you certainly thought it was important for the  
9 Court to understand the SAFE Commission, what they considered,  
10 who was on it.

11 You talked to who was on it and referred to them as  
12 experts; correct, sir?

13 **A.** Yes.

14 **Q.** Okay. Are you now suggesting that the then-Secretary  
15 now-Governor Kemp was indifferent as to who served as the only  
16 cybersecurity expert on this commission? He just left it up to  
17 others?

18 **A.** I know we reached out to Georgia Tech. I don't think that  
19 Secretary Kemp and Dr. Lee or anyone in the Secretary of  
20 State's office had any kind of previous relationship, so it was  
21 really based on their recommendation.

22 And then someone who was willing to serve, and Dr. Lee  
23 was, and there was certain, you know, kind of preconceived  
24 ideas of what people's positions needed to be. We wanted it to  
25 be kind of a full-throated discussion.

1 Q. All right. Flip to the second page of Dr. Lee's  
2 PowerPoint, if you would.

3 And just so we understand, the PowerPoint --

4 THE COURT: Are you putting it up or --

5 MR. CROSS: I'm sorry?

6 THE COURT: Is it up on the screen?

7 MR. CROSS: We can pull it up.

8 Do you have it?

9 THE COURT: No. Go ahead.

10 MR. BROWN: What is the number of the exhibit?

11 MR. CROSS: It is Exhibit 1224.

12 Yeah, the challenge is this is an exhibit that the  
13 defense added.

14 THE COURT: All right. That is fine.

15 MR. CROSS: It is not a criticism. That is why we  
16 don't have it.

17 Didn't we get an extra copy? Does anybody have an  
18 extra copy?

19 MR. BEDARD: Jim wants to put it up.

20 MR. CROSS: Do you mind?

21 Thank you so much.

22 MR. BEDARD: 1224.

23 MR. CROSS: So if we can go to Page 2 of Dr. Lee's  
24 PowerPoint, which may be 10 or 12 pages in. Next page. Thank  
25 you.

1 BY MR. CROSS:

2 Q. Mr. Germany, you see here Dr. Lee's background; right?

3 A. Yes.

4 Q. As you indicated, he was and still is a professor at  
5 Georgia Tech; right?

6 A. I don't know if he still is, but I don't --

7 Q. He was at the time?

8 A. Yes.

9 Q. And if you come down, do you see below are comments that  
10 he included in the slides -- on each of the slides? Do you see  
11 that?

12 A. Yes.

13 Q. And these comments are generally what he delivered when he  
14 gave this as an oral presentation to the SAFE Commission;  
15 right?

16 A. I think that is right, yes.

17 Q. And if we look at Page 2, you can see that he actually  
18 summarizes his background, more than 20 years in cybersecurity.  
19 Do you see that?

20 A. Yes.

21 Q. Okay. And you're not suggesting that, to your knowledge,  
22 the SAFE Commission just simply disregarded or dismissed his  
23 opinions out of hand; right?

24 A. Correct.

25 Q. Now, if we can go to Page 7 of Dr. Lee's presentation to

1 the SAFE Commission, do you see the heading Advanced Persistent  
2 Threats?

3 **A.** Yes.

4 **Q.** And if you look at the first -- in his notes, do you see  
5 where he describes what an advanced persistent threat is in the  
6 first paragraph?

7 And I'll read the second sentence. You see where he says,  
8 such an attack aims to quietly carry out its malicious  
9 activities so that it is hard to not only detect the attack,  
10 but also access the damage upon detection.

11 Do you see that?

12 **A.** Yes.

13 **Q.** And do you see the third line from the bottom in his  
14 comments he writes, APT -- Advanced Persistent Threat --  
15 malware is designed to carry out activities below the detection  
16 threshold?

17 Do you see that?

18 **A.** Yes.

19 **Q.** Do you have any knowledge, as you sit here, as to how the  
20 SAFE Commission considered in adopting the current voting  
21 system that this type of threat would be detected?

22 MR. BEDARD: Objection, Your Honor. I just say I  
23 think it misrepresents prior testimony as to whether the SAFE  
24 Commission was adopting the next voting system.

25 MR. CROSS: Did I misspeak? I'm sorry. Let me say

1 that again.

2 THE COURT: Recommending.

3 MR. CROSS: Yes. Recommended. Let me ask the  
4 question again for you.

5 BY MR. CROSS:

6 **Q.** Based on your experience in dealing with the SAFE  
7 Commission, do you have any knowledge as to how the commission  
8 planned or whether it even considered that the voting system  
9 that it recommended would address the concern raised here, that  
10 APT malware is designed to carry out activities below the  
11 detection threshold?

12 **A.** I know Dr. Lee presented this to the SAFE Commission.  
13 Dr. Lee also moderated a panel similar to that disability panel  
14 where they had other -- he had other cybersecurity experts  
15 present also and ask different questions.

16 And my impression is that the SAFE Commission took into  
17 account all of -- all of that, in addition to all the other  
18 things that they had to take into account. And then, you know,  
19 they weighed them however they wanted to individually.

20 But my impression was that they were paying attention. I  
21 know Dr. Lee, I think, made this -- I don't know if it is this  
22 particular one, but a presentation like this individually and  
23 to all of the SAFE Commission. So I think they took it into  
24 account.

25 **Q.** But as you sit here, despite all your experience working

1 with the SAFE commission, you can't identify any specific  
2 measures that you heard discussed in any meeting where the  
3 members of the SAFE Commission said, the system we recommend  
4 will resolve this concern? You can't identify any measures for  
5 the Court; right, sir?

6 **A.** Not off the top of my head, no.

7 **Q.** If you flip to Page 8, if you would, still in Dr. Lee's  
8 presentation. The heading here is Achieving Cybersecurity.

9 Do you see that?

10 **A.** Yes.

11 **Q.** And Option Number 2 is keep away would-be attackers.

12 Do you see that?

13 **A.** Yes.

14 **Q.** And you then identify as the insider attacks -- you  
15 identified that as threat.

16 Do you see that?

17 **A.** Yes.

18 **Q.** And if you come down in his comments in the third  
19 paragraph, he presented to the SAFE Commission his concern that  
20 the second approach is to keep our cyber systems away from the  
21 would-be attackers so that they cannot compromise our systems.

22 Do you see that?

23 **A.** Yes.

24 **Q.** And fair to say that the breaches that occurred in Coffee  
25 County are exactly the type of attack that he warned here;

1 right?

2 **A.** I would think they would be more of kind of the insider  
3 issue that he talks about just after that.

4 **Q.** Right. If you come down to comments, the paragraph  
5 beginning finally, he explains about an insider attack by rogue  
6 staff member or volunteer; right? Yes?

7 **A.** I'm sorry.

8 **Q.** Last paragraph.

9 **A.** Yes.

10 **Q.** Now, if you come to Page 9, if you would --

11 **A.** Coffee County was the insider, kind of let those people  
12 in, which would be a problem in any type of system.

13 **Q.** If you come to -- well, let's just hit that because you  
14 said it.

15 You said it would be a problem in any type of system;  
16 right, sir?

17 **A.** Yes.

18 **Q.** So let's jump ahead for a moment then.

19 Do you recall that the central point of Dr. Lee's  
20 objection that he laid out in this presentation to BMDs was  
21 that it greatly increased risk? You say that this type of risk  
22 could happen in any system. His opinion that he laid out was,  
23 you mitigate against that risk with hand-marked paper ballots.

24 Do you recall that?

25 **MR. BEDARD:** Sorry. Just before he answers, just



1 establish the same consideration for plaintiffs' concerns that  
2 Dr. Lee's opinions are not being offered as opinion testimony  
3 by plaintiffs in this case but merely something that was  
4 considered by the SAFE Commission.

5 MR. CROSS: Your Honor, unlike the hearing transcript  
6 which came in not for the truth, they offered Exhibit 1224  
7 without any limitation. It is in for the truth.

8 MR. BEDARD: I don't -- plaintiffs didn't object on  
9 hearsay grounds, Your Honor.

10 MR. CROSS: Exactly.

11 MR. BEDARD: If they are offering, then I'm objecting  
12 to them using Dr. Lee's opinions as for the truth of the matter  
13 asserted. I think that is just a backdoor way around getting  
14 expert testimony in, which is just what the plaintiffs objected  
15 to us doing.

16 Again, it is a document. It is a public document the  
17 Court can consider. It was certainly considered by the SAFE  
18 Commission. But I don't think you can take Mr. Lee's opinions  
19 for the truth.

20 MR. CROSS: That's not how the rules of evidence  
21 work. They offered Exhibit 1224 without any limitation on the  
22 Court's consideration. There is no limitation. It is in for  
23 the truth.

24 MR. BEDARD: And I believe my answer was in response  
25 to their objection. Maybe I'm getting the exhibits mixed up.

1 But it was that I could shortcut all of this and say I'm not  
2 offering the SAFE Commission report or its appendices for the  
3 truth of the matter.

4 Again, the point is, this is just a backdoor way of  
5 getting expert testimony in, and that is inappropriate under  
6 rule -- is it, you know, 701 or 601, so --

7 THE COURT: Well --

8 MR. BEDARD: And 26, for that matter.

9 THE COURT: Dr. Lee, who has appeared in this court  
10 and given testimony before --

11 MR. CROSS: He has not. I do want to be clear.

12 THE COURT: But in any event, I think you can  
13 question the witness about it without it being -- so that he is  
14 familiar with the fact. Because, apparently, the witness  
15 attended the meetings.

16 And I don't think you can backdoor the expert  
17 testimony, but I think you can ask him about it because  
18 obviously Dr. Lee is an esteemed, experienced cybersecurity  
19 specialist and was the only one on the commission. You can ask  
20 him about how they dealt with the issues he raised.

21 MR. BEDARD: I think our concern, Your Honor -- and I  
22 appreciate you saying he can't backdoor the expert testimony  
23 in. But I believe the question when I was asking about the  
24 disability community was very clear, we could not rely on that  
25 for opinion testimony. I think those people within their field

1 are just as equally considered as Dr. Lee in his.

2 THE COURT: I don't think that I discouraged you. I  
3 allowed you to fully explore that.

4 MR. BEDARD: I just want to make sure we're on the  
5 same field here.

6 THE COURT: However, I need a restroom break, so I'm  
7 going to -- we're going to -- I'm just going to go and come  
8 right back. If anyone else is as desperate as me. I'll be  
9 much nicer if I can go.

10 COURTROOM SECURITY OFFICER: All rise.

11 **(A brief break was taken at 5:16 PM.)**

12 THE COURT: Okay.

13 BY MR. CROSS:

14 **Q.** Mr. Germany, just a few more questions on this. Still on  
15 Exhibit 1224.

16 Could you flip to Page 9 of Dr. Lee's presentation.

17 **A.** Yes.

18 **Q.** And if you look here, the heading is Achieving  
19 Cybersecurity.

20 Do you see that?

21 **A.** Yes.

22 **Q.** And if you come down in the first paragraph, you see that  
23 he provides what he refers to as a textbook definition that he  
24 teaches in his classes on achieving cybersecurity.

25 Do you see that in the first paragraph?

1     **A.**     Yes.

2     **Q.**     And he goes on to state, security is a state of well-being  
3     for information and infrastructures in which the possibility of  
4     successful, yet undetected theft, tampering, and disruption of  
5     information and services is kept low or tolerable.

6             And tolerable is emphasized.

7             Do you see that?

8     **A.**     Yes.

9     **Q.**     Security goals include confidentiality, authenticity,  
10    integrity, and availability.

11            Do you see that?

12    **A.**     Yes.

13    **Q.**     And to your knowledge, when he presented this and  
14    discussed this as a standard for cybersecurity for a voting  
15    system, no one in the SAFE Commission told him that it was  
16    necessary to provide a mathematical quantification of  
17    cybersecurity; right?

18    **A.**     I don't think so.

19    **Q.**     Now, if you flip to Slide 13, please, and here again,  
20    we've got the heading Cybersecurity and Voting Systems.

21            Do you see that?

22    **A.**     Yes.

23    **Q.**     And if you come to the second paragraph, it provides  
24    another scientific standard where he writes, one security  
25    feature that a voting system must have is to be -- and he puts

1 in quotes -- strong, software-independent.

2 Do you see that?

3 **A.** Yes.

4 **Q.** And when he articulated this as a cybersecurity standard  
5 for voting system, to your recollection and knowledge, no one  
6 on the SAFE Commission disputed that that would be an  
7 appropriate cybersecurity standard; right, sir?

8 **A.** Not to my knowledge.

9 **Q.** If you come to the last paragraph, you can see where he  
10 explains the SAFE Commission, what he was talking about with  
11 the standard. He writes, if a voting system is strong,  
12 software-independent, then it can recover from cyber attacks.  
13 This obviously requires another trail of voters' evidence that  
14 cannot be tampered or deleted by the software.

15 Do you see that?

16 **A.** Yes.

17 **Q.** Okay. Last thing on this, if you come to Slide 15, still  
18 a heading of Cybersecurity and Voting Systems.

19 And if you come to the second paragraph, do you see the  
20 bolded sentence?

21 **A.** Yes.

22 **Q.** So the recommendation of the only cybersecurity expert who  
23 served on the commission was that the best approach is require  
24 the voters to hand-mark paper ballots that are then scanned and  
25 tallied by cyber systems but also dropped in a safe box;

1 correct, sir?

2 **A.** Yes.

3 **Q.** And if you come to the last paragraph, four lines from the  
4 bottom, do you see the line that begins, it absolutely cannot?

5 Do you see that language four lines from the bottom?

6 **A.** Yes, I see that.

7 **Q.** And so the recommendation -- the opinion of the only  
8 cybersecurity expert who served on the SAFE Commission was that  
9 whatever this new system would be, it absolutely cannot be a  
10 barcode, QR code, or any other kind of encoding scheme that is  
11 readable only by a machine because the cyber system that reads  
12 the ballots also can be compromised and lie to the voter or the  
13 auditor.

14 That was his recommendation; right?

15 **A.** He -- I think he is referring to -- the next sentence  
16 talks about the manual -- during a manual review, a human must  
17 be able to view evidence of the voter's original act.

18 So I'm not sure if he's referring in his previous sentence  
19 to a manual review or to something, you know, scanned by a  
20 scanner.

21 **Q.** Well, if you come to the first sentence of the paragraph,  
22 he explains, regardless of whether a paper ballot is  
23 hand-marked or is a printout received from a ballot-marking  
24 device.

25 Do you see that context?

1     **A.**     Yes.

2     **Q.**     And then he goes on, it absolutely cannot be a barcode, QR  
3     code, or any other kind of encoding scheme.

4             That was his recommendation; right, sir?

5     **A.**     Well, you read the part, regardless of whether a paper  
6     ballot is hand-marked or is a printout receipt from a  
7     ballot-marking device, he says it must be easily and clearly  
8     readable and manually countable.

9             And so, obviously, the way it works in Georgia is the  
10    manual count like an audit is done using the text on the  
11    ballot, and the scanner reads a QR code.

12    **Q.**     Right. The official tabulation is a QR code; right?

13    **A.**     Yes. And the audit looks at the manual or the text to --

14    **Q.**     I'm sorry.

15             If an audit is done, someone reviews the human readable  
16    text; right?

17    **A.**     An audit is required to be done after every statewide  
18    election.

19    **Q.**     Right. So in the rare event where a contest is subject to  
20    an audit, that is what you're talking about when the human  
21    readable text is reviewed; right?

22    **A.**     I don't know that I would agree it is rare. It is after  
23    every statewide election. But the text on the ballot that  
24    lists the candidate's name is what is audited.

25    **Q.**     And even when there is an audit, the tabulation is what

1 controls; right? The tabulation of the QR code?

2 MR. BEDARD: Your Honor, I just object. I think it  
3 is starting to get outside the scope of the direct. The direct  
4 was just about the information that is presented to the SAFE  
5 Commission by various people. I think Mr. Cross is now  
6 asking --

7 THE COURT: Your objection is sustained.

8 MR. BEDARD: Thank you.

9 BY MR. CROSS:

10 Q. Do you have the SAFE Commission report, 856, in front of  
11 you?

12 A. Yes.

13 Q. And if you come to Page 3 of the background section, the  
14 last paragraph there that was put up, do you see that, the SAFE  
15 Commission's mission? Do you see that?

16 A. Yes.

17 Q. And do you recall that that was actually highlighted on  
18 the screen for you to read?

19 A. Yes.

20 Q. And it indicates that part of the mission was a focus on  
21 security; is that right?

22 A. Yes.

23 Q. And the only expert who served on the commission and gave  
24 a presentation throughout the SAFE Commission's proceedings on  
25 cybersecurity was Dr. Lee; is that right?



1     **A.**     He -- Dr. Lee also moderated a panel that had other  
2     cybersecurity experts present to the commission.

3     **Q.**     They didn't serve on the commission?

4     **A.**     Right. Maybe I misunderstood your question. I'm sorry.

5             MR. CROSS: Your Honor, give me one moment.

6                     **(There was a brief pause in the proceedings.)**

7             MR. CROSS: Your Honor, I don't have any more  
8     questions at this time, but we reserve the right to recall  
9     Mr. Germany as a rebuttal witness.

10            Oh, sorry. I did -- I apologize. There was one  
11    thing I forgot.

12    BY MR. CROSS:

13    **Q.**     You mentioned that Mr. Persinger was engaged in May of  
14    2021 to examine a server that had been taken from KSU.

15    **A.**     We had received a copy of that server from the FBI, but  
16    the original server was a KSU server.

17    **Q.**     Just so we have the timing right, this was the same month  
18    when the Secretary's office learned about the card from Cyber  
19    Ninjas in the Coffee County elections office; right?

20    **A.**     Yes. My recollection on that was refreshed when we spoke  
21    last week.

22    **Q.**     And it was the same time when the Secretary's office  
23    actually took the EMS server from Coffee County because it was  
24    inaccessible; right? Do you recall that?

25    **A.**     I believe that was around the same time.

1 Q. Are you aware that Mr. Persinger in the summer of 2022  
2 submitted, I think, at least two declarations?

3 A. I know he submitted -- I can think of one, but I don't  
4 dispute that.

5 Q. You testified the other day that you had involvement  
6 working with outside counsel on litigation strategy and  
7 discovery.

8 Did you have any role or involvement with his  
9 declarations -- the one submitted in 2022?

10 A. No, not to my recollection.

11 Q. Would it surprise you that in none of the declarations  
12 Mr. Persinger has submitted he has ever so much as mentioned  
13 KSU?

14 A. I wouldn't know one way or the other.

15 Q. But that wouldn't surprise you if that was the purpose of  
16 his engagement, when he was engaged in the very same month you  
17 guys took an EMS server from Coffee County?

18 MR. BEDARD: Objection, Your Honor. Asked and  
19 answered.

20 THE COURT: Well, you can answer it.

21 THE WITNESS: It doesn't surprise me.

22 MR. CROSS: Okay. Thank you.

23 CROSS-EXAMINATION

24 BY MR. BROWN:

25 Q. Mr. Germany, Bruce Brown. One follow-up question on the

1 KSU server.

2 What did the KSU server investigation in May of 2021 have  
3 to do with this litigation, or did it?

4 **A.** It did have to do with this litigation. Litigation  
5 counsel was probably -- my role is basically, you know, if they  
6 want to hire someone, they kind of run it by me as the in-house  
7 counsel, and I am good with it.

8 **Q.** Help me out.

9 The KSU server was an issue back when I was in my fifties,  
10 I think, when --

11 THE COURT: When I was 25.

12 BY MR. BROWN:

13 **Q.** What possible -- just explain it to us because it looks  
14 really fishy, quite frankly.

15 What possible relevance would it have to this litigation  
16 today or in May of 2021?

17 MR. BEDARD: I would object just to the extent that  
18 Mr. Germany -- his understanding of the relevance is coming  
19 from litigation counsel in this case on the basis of privilege.

20 THE COURT: Well, he can answer to the extent that he  
21 knows and not reveal litigation -- any sort of privileged  
22 information.

23 BY MR. BROWN:

24 **Q.** I mean, without anything more, it looks really fishy.

25 Can you help us out here?

1 MR. BEDARD: Objection, Your Honor. Argumentative.

2 THE WITNESS: Could you repeat the question.

3 BY MR. BROWN:

4 Q. Do you know what connection the KSU server has to this  
5 litigation such that it would require the State to hire an  
6 expert for the KSU server when they did not even hire an expert  
7 for this litigation in chief?

8 MR. BEDARD: Objection, Your Honor. I don't think  
9 that is established at all.

10 MR. BROWN: They don't have one. But go ahead answer  
11 the question.

12 THE COURT: All right. Just simplify it. Don't jump  
13 into the whole other set of facts. You know that.

14 BY MR. BROWN:

15 Q. What was he doing with the KSU server in May of 2021 --

16 MR. BEDARD: I would object.

17 MR. BROWN: -- that was relevant to this litigation,  
18 just generally, without exposing any --

19 MR. BEDARD: I think the subject matter of what he  
20 was doing is itself work product and attorney-client. He is  
21 hired as a consulting expert relevant to the litigation. The  
22 only reason this is even relevant is because plaintiffs put at  
23 issue why Mr. Persinger was hired. We have answered that  
24 question. I don't think that he can testify as to what  
25 Mr. Persinger was doing. That is privileged as a consulting

1 expert.

2 MR. CROSS: Rule 502 is clear on this, Your Honor.  
3 You can't invoke privilege as a sword and shield. And what it  
4 says is, if you have deliberately waived privilege -- 502(a),  
5 if I remember right -- if you have deliberately waived  
6 privilege and there is additional information that would  
7 provide a complete understanding of the facts, that has to come  
8 out. They want to use what they claim was privileged  
9 information about why he was retained, which no one has ever  
10 heard before in years, but then not get us -- let us  
11 cross-examine on that.

12 So it either gets stricken from the record and the  
13 Court can't consider it, or we are entitled to examine the  
14 facts of what he was actually doing and why anybody thought it  
15 mattered at that time.

16 MR. BEDARD: Well, Your Honor, I answer two points.  
17 First off, this is Mr. Brown's questioning, not  
18 Mr. Cross'.

19 Two, I will say we haven't used it as a sword and  
20 shield. We have used it as a shield and a shield. We're  
21 not -- we haven't invoked privilege. We haven't exposed  
22 privileged information to answer an inference that plaintiffs  
23 are trying to draw. We have just answered the factual  
24 question, what was he hired for? He was hired as a consulting  
25 expert in relation to the KSU server. That's it, which they

1 don't -- what he was doing is beyond the scope.

2 Again, I would reiterate that again, this is  
3 Mr. Brown's questioning, not Mr. Cross'.

4 MR. BROWN: Your Honor, I adopt everything that  
5 Mr. Cross was saying.

6 THE COURT: Actually --

7 BY MR. BROWN:

8 Q. But, Mr. Germany, you testified on direct that you  
9 volunteered the information that Mr. Persinger was hired in  
10 2021 to do something with the KSU server.

11 And you testified in response to my question that that  
12 was, by counsel, relating to this litigation; correct?

13 A. Yes.

14 Q. Can you tie up those two observations? What was the --  
15 just general, at a very general level. Because it is not  
16 apparent by anything we know about the case.

17 A. My understanding is that he was hired to look at the -- do  
18 some kind of forensic -- I don't know if analysis is the right  
19 word or just view of the KSU server. And my general  
20 recollection, I know the KSU server was at issue in a lot of  
21 the Court's orders, and I think it became apparent at some  
22 point that we needed to have someone look at it, but I really  
23 can't say more than that.

24 Q. Are you sure he was not also looking at the Coffee County  
25 server at the same time --

1     **A.**     Yes.

2     **Q.**     -- at the same place?

3     **A.**     Yes.

4             THE COURT:   You are sure that he was not?

5             THE WITNESS:   I am completely 100 percent sure.

6             THE COURT:   Thank you.

7     BY MR. BROWN:

8     **Q.**     You testified that the legislature --

9     **A.**     No.   I just think later on he did look at the Coffee  
10    County stuff.

11    **Q.**     Right.   You testified that the legislature as opposed to  
12    the SAFE Commission selected the BMDs; right?

13    **A.**     The legislature passed the law that put the system in  
14    place, the BMD -- the BMD requirement.

15    **Q.**     Right.   And the legislature also decided that hand-marked  
16    paper ballots would be the backup if the ballot-marking devices  
17    could not be used; correct?

18    **A.**     There was a law that talks about, you know, if it is an  
19    impossible, or I think impracticable is the word, then you  
20    use -- yes, you have emergency ballots of hand-marked paper  
21    ballots.

22    **Q.**     But you use hand-marked paper ballots; right?

23    **A.**     In that situation, yes.

24    **Q.**     You testified that --

25    **A.**     You also use hand-marked paper for absentee ballots.   They

1 put that in place as well.

2 **Q.** You testified to the effect that one of the concerns of  
3 the SAFE Commission was that disabled voters should not vote on  
4 different systems; correct?

5 **A.** One of the concerns presented to the SAFE Commission, yes,  
6 that is right.

7 **Q.** But voters who need assistance today in Georgia vote on a  
8 different BMD than voters who do not need assistance; correct?

9 **A.** Well, it depends. If you are talking about -- there is  
10 usually one BMD in every polling place that has -- would you  
11 like me to answer?

12 **Q.** Yeah. There is one BMD -- I mean, there is one BMD in  
13 every --

14 **A.** I think the question you asked about voters that need  
15 assistance, and that is a larger subset of voters.

16 And one other thing that came up, I think, in that  
17 disability panel was the ability of voters -- maybe not just  
18 voters who are completely blind, but voters who might need --  
19 they can make larger text or adjust contrast, and those are  
20 things that you can do on a BMD that you can't obviously do on  
21 a hand-marked paper ballot.

22 **Q.** Or may not need to.

23 But, Mr. Germany, what I'm getting at is that the BMD that  
24 we saw Dr. Halderman hack into here -- are you with me? Do you  
25 know which one that was?



1     **A.**     No.

2     **Q.**     Just a normal BMD.

3     **A.**     I'm not aware of that.

4     **Q.**     That a BMD -- that a voter that needs assistance has a  
5     separate plug-in to a BMD; right?

6     **A.**     It is the same BMD. It has what is called a -- the  
7     abbreviation is ATI, like audio tactile interface, I think.

8     **Q.**     Right.

9     **A.**     That allows --

10    **Q.**     And in each voting location, the BMD is set aside with the  
11    indication that it is for those needing assistance; correct?

12    **A.**     Well, there's multiple types of needing assistance, I  
13    think, is why I'm having a little --

14    **Q.**     The machine -- there is one machine that is different in  
15    every voting location because HAVA requires one machine to be  
16    available for assistive technology; correct?

17    **A.**     It is not a different machine. Any BMD can have that --  
18    that interface.

19    **Q.**     It is a different -- it is the same screen. Okay?

20            But, in fact, in the Dominion contract, the State actually  
21    purchased 3,000 ATIs so that the BMDs could be equipped with  
22    this additional equipment in every polling location; correct?

23    **A.**     Yes.

24    **Q.**     And so right now in every polling location, there is a BMD  
25    with a different configuration than all the other ones; right?

1     **A.**     I wouldn't agree that it is a different configuration.

2     **Q.**     And so a voter who is using that is using a different  
3     machine and different system than all the other voters; right?

4     **A.**     No.

5     **Q.**     How can you sit here and say that it is bad for them to do  
6     that when that is exactly what the law does? It has to do  
7     that; right?

8             MR. BEDARD: Your Honor, I think --

9             THE WITNESS: No, I don't agree. I have already said  
10     no.

11            THE COURT: I think counsel wants to make an  
12     objection.

13            MR. BEDARD: I think counsel is not allowing the  
14     witness to fully answer the question as he is cutting him off,  
15     so I would just ask for the witness to be able to answer the  
16     question.

17            THE COURT: All right. State the question again and  
18     let him answer. Thank you.

19     BY MR. BROWN:

20     **Q.**     Today, the State of Georgia provides technology to assist  
21     voters with disabilities that is different than the technology  
22     for voters who do not need that; correct?

23     **A.**     The BMD is the same.

24     **Q.**     I didn't ask that. That is not responsive.

25     **A.**     There is an additional interface that you referred to.

1 The ATI is something that is attached to the BMD in each  
2 polling place.

3 **Q.** And that is visible.

4 If I go into a polling place and a person with  
5 disabilities is voting on that, it looks different than what a  
6 person who is voting on a BMD without that unit; right?

7 **A.** I think one of the main differences is usually that is --  
8 that setup is at a different height. It is more of like at a  
9 wheelchair level.

10 **Q.** Exactly.

11 **A.** The ballot that comes out of that system is the exact  
12 same -- it is the same system. It just has that ATI, which  
13 would not be the case if it was just set up for disabled voters  
14 and everyone else used hand-marked. The ballot would not be  
15 the same.

16 **Q.** But you are treating disability voters differently; right?  
17 There is a separate table, there are signs, and there's  
18 different gear coming out of the BMD; right?

19 **A.** I would say they are voting on the same system, and there  
20 are some differences to try to allow them to best vote  
21 privately and independently.

22 **Q.** And those differences are to assist voters with  
23 disabilities; right? It is not a bad thing to distinguish them  
24 in that respect, is it?

25 **A.** The ATI is a tool that they can use. The overall system

1 is the same as -- and that existed in the DRE system too. It  
2 was the same equipment, same DREs, but they had an ATI  
3 interface on those as well.

4 **Q.** Did the SAFE Commission recommend QR codes, yes or no?

5 **A.** They had a long list of recommendations. I can't recall  
6 specifically.

7 **Q.** You --

8 **A.** I would say this: Given they did have interaction with  
9 all the vendors and they saw the technology that was available,  
10 the technology that was available was -- I think there was some  
11 QR codes and some barcodes coming out of BMD ballots. The SAFE  
12 Commission did recommend using ballot-marking devices for all  
13 in-person voting. And my recollection is there was one vendor  
14 that perhaps used optical character recognition to read a  
15 ballot.

16 But my understanding is -- I mean, the SAFE Commission  
17 would have known from the vendor demonstrations what a  
18 ballot-marking device ballot looked like. It would have been  
19 either a QR code or a barcode.

20 **Q.** Let me ask it in a different way.

21 The SAFE Commission did not recommend QR codes, did it?

22 **A.** They recommended that Georgia use a ballot-marking  
23 device-based system for in-person voting. I think they would  
24 have known that that -- what that included based on the vendor  
25 demonstrations that they were privy to.

1 MR. BROWN: Your Honor, he is not answering my  
2 question.

3 BY MR. BROWN:

4 Q. It is very simple.

5 Did they recommend QR codes?

6 A. I don't think your question really makes sense because  
7 what they recommend is an overall voting system and then other  
8 recommendations as well.

9 Q. Okay.

10 A. I don't think they specifically said QR codes, barcodes,  
11 optical character recognition. I know they specifically made a  
12 recommendation to use ballot-marking devices.

13 MR. BROWN: Thank you, Mr. Germany.

14 MR. BEDARD: Just one minute, Your Honor.

15 THE COURT: Sure.

16 **(There was a brief pause in the proceedings.)**

17 MR. BEDARD: No further questions, Your Honor.

18 THE COURT: May this witness be excused?

19 MR. BEDARD: On our part, yes.

20 THE COURT: Is he subject to recall?

21 MR. CROSS: Yes, we -- depending on -- yes is the  
22 answer. Yes.

23 THE COURT: All right. Don't discuss your testimony  
24 with anyone, and thank you very much for coming back today and  
25 your patience. Thank you.

1 THE WITNESS: Thank you.

2 (There was a brief pause in the proceedings.)

3 THE COURT: Do you-all have some issue you need to  
4 address?

5 MR. MILLER: Sorry.

6 THE COURT: That's all right. That's all right.

7 MR. TYSON: Your Honor, Mr. Miller and I were  
8 discussing -- I think we've been trying to compare notes with  
9 the plaintiffs on which exhibits are in and out, and I  
10 believe -- I think we're down to only one discrepancy.

11 I'm sorry. We resolved it then. I have good news to  
12 report then.

13 THE COURT: All right. Very good.

14 Well, we're going to adjourn today.

15 Did you have something?

16 MR. BELINFANTE: Just a housekeeping measure, Your  
17 Honor. I think this may have been discussed when I was out of  
18 the room.

19 We intend to call Blake Evans tomorrow. He is  
20 participating in a panel sponsored by the federal government at  
21 1:40. It is virtual, but he will need to be out by 1:00. I  
22 was going to ask the Court if it would indulge us to either  
23 have a late lunch tomorrow --

24 THE COURT: That's fine.

25 MR. BELINFANTE: I'll leave it at that and hope we

1 can finish with him.

2 THE COURT: That's fine.

3 MR. BELINFANTE: Thank you.

4 THE COURT: Of course, he's welcome to do a phone  
5 call in the courthouse too. We could probably make room for  
6 him.

7 MR. BELINFANTE: It is a Zoom base, but I will  
8 discuss that with him for sure.

9 THE COURT: All right. All right. So we'll see you  
10 tomorrow morning at 9:30. And Blake Evans is the witness.

11 Do we have an idea how long his testimony will take?

12 MR. BELINFANTE: I would think depending on -- in  
13 lawyer time, I would say anywhere from 45 to 90 minutes. I  
14 know that's a big stretch.

15 THE COURT: On your side?

16 MR. BELINFANTE: On our side, yes, Your Honor. And I  
17 think that just depends on how quickly we can get through some  
18 of the exhibits.

19 THE COURT: All right. Very good.

20 All right. Is there anything counsel needs to  
21 address with the Court?

22 MR. CROSS: So the plan is still we're starting with  
23 the Persinger issue and then Mr. Evans? I thought that is how  
24 we had left it.

25 THE COURT: Well, I don't know.

1 MR. RUSSO: My understanding is you-all -- the  
2 plaintiffs were going to provide a -- Curling plaintiffs were  
3 going to provide us something from Dr. Halderman which we were  
4 going to review. We raised the issue of Blake Evans.

5 THE COURT: You wanted to go --

6 MR. RUSSO: We wanted to get through that.

7 THE COURT: Yeah, so it may be that we end up going  
8 through with Mr. Evans first.

9 MR. CROSS: Okay.

10 MR. RUSSO: I think we were still trying to figure  
11 out if they were going to rest at that time, and then they came  
12 back.

13 MR. CROSS: Got it. We'll start with Mr. Evans.  
14 Okay. Thank you.

15 THE COURT: All right. We'll see you tomorrow then.

16 COURTROOM SECURITY OFFICER: All rise. Court is  
17 adjourned.

18 **(The proceedings were thereby adjourned at 5:52**  
19 **PM.)**

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## C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 167 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 23rd day of January, 2024.

*Shannon R. Welch*

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SHANNON R. WELCH, RMR, CRR  
OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT  
OFFICIAL CERTIFIED TRANSCRIPT

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